No. 87-271-CFX
Status: GRANTED

Title: Harbison-Walker Refractories, a Division of Dresser Industries, Inc., Petitioner
v.
Eugene F. Brieck

Docketed:
August 17, 1987

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Kramer,Andrew M.

Counsel for respondent: Logan,James H., Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Aug 17 1987	G	Petition for writ of certiorari filed.
2	Sep 16 1987		DISTRIBUTED. October 9, 1987
3	Sep 17 1987	X	Brief of respondent Eugene F. Brieck in opposition filed.
5	Feb 29 1988		REDISTRIBUTED. March 4, 1988
7	Mar 8 1988		REDISTRIBUTED. March 18, 1988
8	Mar 21 1988		Petition GRANTED.
			**********
9	May 5 1988		Brief amicus curiae of Chamber of Commerce of the U.S. filed.
10	May 5 1988		Joint appendix filed.
11	May 5 1988		Brief of petitioner Harbison-Walker Refractories filed.
12	May 5 1988		Brief amicus curiae of Equal Employment Advisory Council filed.
13	May 12 1988		Record filed.
		*	Certified copy of original record received.
14	May 17 1988		Record filed.
		*	Certified copy of appendix, supplemental appendix, and partial proceedings received.
16	May 31 1988		Order extending time to file brief of respondent on the merits until June 22, 1988.
17	Jun 1 1988		Brief amici curiae of United States and EEOC filed.
18	Jun 22 1988		Brief amicus curiae of Plaintiff Employment Lawyers Association (PELA) filed.
21	Jun 22 1988		Brief of respondent Eugene F. Brieck filed.
22	Jun 22 1988		Brief amicus curiae of American Association of Retired Persons filed.
19	Jun 27 1988	G	Motion of the Solicitor General for leave to participate in oral argument as amici curiae and for divided argument filed.
20	Jun 27 1988		Motion of the Solicitor General for leave to participate in oral argument as amici curiae and for divided argument GRANTED.
23	Jul 12 1988	G	Application (A88-34) for an extension of time within which to file a reply brief, filed by petitioner, submitted to Justice White.
25	Jul 15 1988		Application (A88-34) granted by Justice White extending the time to file until August 5, 1988.
26	Jul 26 1988		CIRCULATED.
27	Aug 5 1988	X	Reply brief of petitioner Harbison-Walker Refractories filed.
28	Aug 29 1988		Set for argument. Monday, October 31, 1988. (3rd case)(1

No. 87-271-CFX

Entry	Date	Note	Proceedings and Orders
			hr).
29	Oct 31 1988		ARGUED.

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No. ——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC.,
Petitioner,

v.

EUGENE F. BRIECK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether a plaintiff who alleges intentional discrimination can survive summary judgment merely by questioning his employer's business judgment, without presenting any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate?

PARTIES

The parties to the proceeding in the court below were: Eugene F. Brieck and Harbison-Walker Refractories, a Division of Dresser Industries, Inc.*

* Dresser Industries, Inc. ("Dresser") is a corporation whose shares are publicly held. Dresser has an interest in the following corporate entities and partnerships: Airetool and Yost Superior Realty, Inc.; Bartil, Inc.; IRI International Corporation; Kewaunee Engineering Corporation; Standard Oil Proppants, L.P.; Road Machinery Company; BJ Titan Services Company; Dresser-Rand Company; M-I Drilling Fluids Company; Dresser-Cullen Venture; Western Atlas International, Inc.; and Worthington Pump Asia Pte. Ltd.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. ———

HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC.,
Petitioner,

v.

EUGENE F. BRIECK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Harbison-Walker Refractories, a Division of Dresser Industries, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 19, 1987.

OPINIONS BELOW

The unreported opinion of the Court of Appeals appears in the Appendix at 1a to 11a. The December 19, 1985 opinion of the United States District Court for the Western District of Pennsylvania is reported at 624 F. Supp. 363, and is reproduced in the Appendix at 12a to 21a. The District Court's January 16, 1986 memoran-

dum opinion and order denying Respondent's request for reconsideration is unreported and appears in the Appendix at 22a to 25a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on June 19, 1987. Jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 4(a)(1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* ("ADEA" or the "Act"), provides in pertinent part:

> It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .

29 U.S.C. § 623(a)(1).

STATEMENT

Harbison-Walker Refractories ("Harbison-Walker" or the "Company") sells specialized ceramic brick products primarily to steel producers. App. at 12a. In June 1965, it hired Respondent, Eugene Brieck, as an installation specialist in its Iron and Steel Marketing Support Group (the "Steel Group"). App. at 13a. Respondent, like the Steel Group's other such specialists, supervised the installation of the Company's ceramic brick products. *Id.*

By 1982, the economic decline in the domestic steel industry had taken its toll on the Company's sales. From 1979 to 1982, its sales of ceramic brick products fell nearly 30 percent, and profits from those sales plummeted from approximately $64 million to a deficit of $20 million. App. at 12a-13a.

Faced with mounting losses, Harbison-Walker reduced its workforce. In early July 1982, it laid off several employees in its Steel Group, including Respondent, then 55 years of age, and an older but less senior installation specialist. App. at 13a. Within a month, the Company terminated another installation specialist, but retained 39-year-old Hugh Faust, an installation specialist who had only slightly less seniority than Respondent, for an additional four months. App. at 13a, 17a. It did so, *inter alia*, because Faust's diverse skills and broader experience rendered him more versatile in the reduced Steel Group. Specifically, the Company retained Faust longer because—unlike Respondent—he had (1) considerable prior experience as a sales correspondent; (2) superior experience in working with records and written reports, including the preparation of bids and quotations; and (3) experience in installation work in blast furnace casthouses—a targeted growth area for Harbison-Walker. App. at 3a-4a. In addition, Faust had slightly higher performance ratings than Respondent. App. at 4a.

In mid-November 1982, however, the Company also laid off Faust.[1] Nearly nine months later, when sales increased slightly, Harbison-Walker recalled Faust to its still-struggling Steel Group. App. at 13a.

The Proceedings Below

On June 29, 1984, Respondent filed suit alleging that Harbison-Walker terminated and failed to recall him because of his age. After discovery, the Company moved for summary judgment. It argued that Respondent had not established a prima facie case of age discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792

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[1] App. at 13a. From June 1982 to November 1982, the Company laid off eleven of the 32 employees of the Steel Group; only three of those laid off were over age 40. Significantly, over half of the 21 employees remaining in the Steel Group after these layoffs were 40 years of age or older. App. at 17a.

(1973), and that, even assuming he had, the Company terminated him for legitimate, nondiscriminatory business reasons. Further, the Company contended that, because Respondent failed to produce any evidence that the proffered business reasons were a pretext for discrimination, no genuine issue of fact remained for trial.

In opposing summary judgment, Respondent did not dispute that Faust had experience with marketing and administrative matters which he did not have. App. at 4a. Nor did he dispute that some portion of Faust's work, albeit less than 25 percent, drew upon this experience. App. at 5a. Rather, he argued only that Faust's experience was unimportant, in that he spent 75 percent of his time performing installation work for which Respondent was equally qualified. *Id.* In short, Respondent did not dispute that Faust had more diverse experience, and that, from time to time, Harbison-Walker utilized that experience. He questioned only the Company's business judgment that such diverse experience was utilized enough to justify Faust's, and not Respondent's, recall.

The district court ruled that no material facts were in dispute. Although holding that Respondent had established a prima facie case of age discrimination, it nonetheless concluded that the Company had articulated legitimate, nondiscriminatory business reasons for its decision to retain Faust, rather than Respondent. App. at 15a-17a. Specifically, the district court found that, although Faust had slightly less seniority than Respondent, he had slightly better performance evaluations and broader experience in marketing and administrative functions. App. at 16a. Because Respondent merely questioned the Company's business judgment, without "forg[ing] the critical link between [the challenged] actions and [Respondent's] age with *relevant* proof," App. at 23a (emphasis in original), the court concluded that Respondent's evidence could not satisfy his burden of persuasion that

age motivated the Company's decision. Thus, absent evidence that any possible error in Harbison-Walker's business judgment was a pretext for age discrimination, the district court declined Respondent's invitation to second-guess the Company's decision.

The Third Circuit reversed. Relying solely on its recent decision in *Chipollini v. Spencer Gifts*, 814 F.2d 893 (3d Cir. 1987) (*en banc*), *petition for cert. filed*, 55 U.S.L.W. 3872 (U.S. June 17, 1987) (No. 86-2007), it concluded that:

> To meet its burden on summary judgment, the defendant employer must show that the plaintiff will be *unable to introduce* either direct evidence of a purpose to discriminate, or *indirect evidence of that purpose by showing that the [employer's] proffered reason is subject to factual dispute.*

App. at 4a (emphasis added). It further stated that, to defeat his employer's motion, Respondent was not required to "establish a direct inference that the employer discharged him because of his age." App. at 2a. Rather, the court concluded, Respondent need only "cast doubt" on the credibility of his employer's articulated reasons so as to "permit a reasonable inference that the employer's proffered explanation for the discharge is *unworthy of credence.*" App. at 2a (emphasis added).[2]

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[2] In *Chipollini*, the employer discharged the plaintiff as part of staff reductions, but retained a younger employee, allegedly because the younger employee was considered better able to handle work in a reduced department and because the plaintiff had failed to perform certain projects satisfactorily. After the plaintiff sued, and discovery was completed, the employer sought summary judgment. To defeat summary judgment, the plaintiff introduced evidence which contradicted the facts underlying the employer's decision, but introduced no evidence of age discrimination. The district court granted the employer's motion because the plaintiff raised no issue of fact as to whether age motivated the employer's decision. The Third Circuit reversed, finding, as it did in the instant case, that a plaintiff can survive summary judgment merely by demon-

Applying these standards, the court of appeals held that Respondent's self-serving claim—that the "small" amount of time (less than 25 percent) that Faust spent on non-installation duties rendered Harbison-Walker's business judgment suspect—was sufficient to defeat summary judgment. According to the court below, the Company's asserted need for Faust's admittedly diverse experience and its use of that experience for less than 25 percent of the time constituted " 'evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge (which) reasonably *could* support an inference that the employer did not act for (those) non-discriminatory reasons.' " App. at 4a, *quoting Chipollini*, 814 F.2d at 900.[3]

Judge Weis dissented, stating that (App. at 8a-10a):

> Essentially, the plaintiff's evidence is that he believed himself to be a better qualified installation specialist than Faust.
>
> * * * *
>
> Basically, plaintiff contends that because Faust spent twenty-five percent of his time after recall preparing reports of installations (an activity Brieck had performed) as well as working on "margins" and filing (tasks which Brieck neither had done nor was trained to do), the employer has failed to demonstrate its need for Faust's diverse qualifications.
>
> * * * *

strating that the employer's proffered reason is not credible and without introducing evidence that age in fact motivated the employer's decision. Judge Hunter dissented. He stated that "it is not enough for the plaintiff to show pretext in order to withstand the defendant's motion for summary judgment; . . . he must go further, and show that the proffered explanation is a pretext specifically for age discrimination." 814 F.2d at 902. In his view, by requiring less, the majority "effectively and impermissibly shifted the burden of persuasion from [the plaintiff] to [his employer]." *Id.* at 903.

[3] Having found this "inconsistency," the court did not address the remaining—and largely uncontested—reasons for the Company's termination of Respondent.

> When reduced company operations warrant the service of one installation specialist for only seventy-five percent of his time, efficiency requires some utilization of the remaining twenty-five percent. Although plaintiff may argue he could work as effectively for part of that time, significantly he cannot prove his ability to perform equally well for the entire 25 percent period. The concession that he, unlike his rivals, might require training only underscores the validity of the employer's reason for selecting Faust.

Judge Weis thus concluded that Respondent had "failed to show a dispute of fact on a material issue which would demonstrate pretext." App. at 11a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH PRINCIPLES ESTABLISHED BY THIS COURT.

This case presents a critically important, and frequently recurring, issue of federal law: whether a plaintiff who alleges intentional discrimination can survive summary judgment merely by questioning his employer's business judgment, without presenting any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate. The Third Circuit held that he can. That decision conflicts with three principles established by this Court: first, that the ultimate burden of persuasion in a discrimination case "remains at all times with the plaintiff" who must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination," *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); second, that summary judgment must be entered against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," *Celotex Corp. v. Ca-*

trett, 106 S. Ct. 2548, 2552-53 (1986); and third, that the ADEA "was not intended to 'diminish traditional management prerogatives,'" *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 259, *quoting United Steelworkers of America v. Weber*, 443 U.S. 193, 207 (1979).

A. The Decision Below Contravenes This Court's Allocation Of Evidentiary Burdens In Employment Discrimination Cases And Standards For Summary Judgment.

In employment discrimination cases, the plaintiff bears the initial "burden of proving by the preponderance of the evidence a prima facie case of discrimination." *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 252-53; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Once it does so, creating an "inference of unlawful discrimination," *id.* at 253, the burden then "shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employ[ment action].'" *Id.*, *quoting McDonnell Douglas v. Green*, 411 U.S. at 802; *see also Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). If the defendant carries this burden of production, it "destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence," and "the factual inquiry proceeds to a new level of specificity." *Id.* at 255 and n. 10. Because the ultimate burden of persuasion "remains *at all times* with the plaintiff," he must then "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a *pretext for discrimination.*" *Id.* at 253 (emphasis added).

In summary judgment proceedings, courts must view the evidence presented "through the prism of the[se] substantive evidentiary burden[s]." *Anderson v. Liberty Lobby*, 106 S. Ct. 2505, 2513 (1986). To be sure, an

employer seeking summary judgment in an employment discrimination case bears the burden of showing that no genuine issue of material fact exists to be tried. *See* Fed. R. Civ. P. 56(c). "[B]ut the plaintiff is not thereby relieved of his own burden of producing in turn [affirmative] evidence that would support a jury verdict." *Anderson v. Liberty Lobby*, 106 S. Ct. at 2514; *see also Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1356 (1986) (citations and footnote omitted) ("[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts").

Because an ADEA plaintiff always bears the ultimate burden of persuasion on his discrimination claim, he may avoid summary judgment only by producing specific evidence demonstrating that a genuine issue of *material* fact remains for trial. *See* Fed. R. Civ. P. 56(e).[4] Indeed, as this Court held in *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552-53 (1986) (emphasis added):

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who *fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.* In such a situation, there can be 'no genuine issue as to any material fact,' since a com-

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[4] As this Court has aptly noted, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby*, 106 S.Ct. at 2510 (emphasis in original). Moreover, "[i]f the evidence is merely colorable, *Dombrowski v. Eastland*, 387 U.S. 82, 87 S. Ct. 1425, 18 L. Ed.2d 577 (1967) (*per curiam*), or is not significantly probative, [*First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253,] 290, 88 S. Ct. at 1592, summary judgment may be granted." *Id.* at 2511.

plete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Read together with *McDonnell Douglas* and *Burdine*, therefore, *Celotex* and *Liberty Lobby* require an ADEA plaintiff opposing summary judgment to adduce—as he would have to at trial—sufficient evidence to support the essential element of his case: that he was the victim of discrimination "because of [his] age." [5]

The decision below requires substantially less. It permits a plaintiff claiming employment discrimination to avoid summary judgment simply by second-guessing his employer's business judgment, even though he admits all of the facts underlying that judgment, even though the

[5] Significantly, the mere fact that a plaintiff establishes a prima facie case of age discrimination does not mean that summary judgment is improper. *See, e.g., Grigsby v. Reynolds Metal Co.*, 821 F.2d 590 (11th Cir. 1987); *Dea v. Look*, 810 F.2d 12, 15 (1st Cir. 1987); *Pace v. Southern Railway System*, 701 F.2d 1383, 1389 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983); *Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983). Nor does the employer's articulation of a legitimate, nondiscriminatory reason for an employment action necessarily create a question of fact warranting trial. *See, e.g., Grigsby v. Reynolds Metal Co., supra*; *Klein v. Trustees of Indiana University*, 766 F.2d 275, 281-82 (7th Cir. 1985); *Pace v. Southern Railway System*, 701 F.2d at 1391. Rather, to create a genuine issue of material fact for trial, the plaintiff cannot "merely rest on the laurels of her prima facie case in the face of powerful justification evidence offered by the defendant", but must introduce additional evidence that the employer's actions are a pretext for *discrimination*. *See Grigsby v. Reynolds Metal Co., supra*; *see also* discussion *infra* at 15-19. The need for such additional evidence is obvious where, as in the Third Circuit, a plaintiff can establish a prima facie case merely by demonstrating that he is in the protected age group and was laid off while younger employees were retained in similar jobs for which he was qualified. *See Duffy v. Wheeling-Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983).

legally mandatory inference of unlawful discrimination has "drop[ped] from the case", *Burdine*, 450 U.S. at 255 n. 10, and even though he has produced no specific evidence, direct or indirect, that the employer's judgment was really motivated by intentional discrimination. At the same time, the decision below enlarges the employer's legitimate summary judgment burden (i.e., to prove the absence of any *material* facts), and imposes on it a virtually unattainable one: to show that the plaintiff will be "unable" to create some factual dispute concerning the employer's proffered reasons.

Such a result comports with neither this Court's interpretation of Rule 56 nor its allocation of evidentiary burdens in employment discrimination cases. Contrary to *Burdine*'s conclusion that a "defendant need not persuade the Court that it actually was motivated by the proffered reasons," 450 U.S. at 254, an employer in the Third Circuit can prevail on summary judgment in an employment discrimination case only if it convinces the court that its business judgment is unimpeachable. Further, contrary to *Celotex*, the decision below relieves the ADEA plaintiff of his obligation to produce specific facts concerning an essential element of his case—intentional discrimination on the basis of age—in order to defeat summary judgment. Because the decision below is plainly at odds with this Court's decisions, and because of the importance of the issue presented, review should be granted.

B. The Decision Below Contravenes This Court's Recognition That The ADEA Should Not Interfere With Traditional Business Judgments.

The decision below contravenes yet another principle articulated by this Court: that the ADEA "was not intended to 'diminish traditional management prerogatives.'" *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 259, *quoting United Steelworkers*

of America v. Weber, 443 U.S. at 207; *see also Local No. 93, International Association of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3074 (1986) (in enacting Title VII of the Civil Rights Act, Congress intended "'management prerogatives . . . to be left undisturbed to the greatest extent possible'"), *quoting* H.R. Rep. No. 914, 88th Cong., 2d Sess., pt. 2, at 29 (1963).

That the ADEA was "not intended as a vehicle for judicial review of business decisions" is well-settled. *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *see also Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1218-19 (7th Cir. 1985); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982). As aptly stated by the court in *Parker v. Federal National Mortgage Association*, 741 F.2d 975, 981 (7th Cir. 1984):

> Decisions [as to the relative strengths and weaknesses of employees] will always involve a number of subjective factors, and disappointed candidates cannot expect a federal judge to intervene simply in the hope that he or she will evaluate the factors differently. The ADEA only requires the intervention of the federal judiciary when age is a determining factor in the decision.

See also Dale v. Chicago Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987) ("This Court does not sit as a super-personnel department that reexamines an entity's business decisions"). Not surprisingly, therefore, courts have granted summary judgment in employment discrimination cases where an employee does nothing more than "challenge the judgment of his superiors through his own self-interested assertions." *Dale v. Chicago Tribune Co.*, 797 F.2d at 464-65; *see also Matthews v. Allis-Chalmers*, 769 F.2d at 1218.

The flaw in the decision below is thus plain. It allows an employee to avoid summary judgment, and to obtain judicial review of his employer's business judgment, merely by raising some subjective disagreement with that judgment. He can do so without producing evidence, direct or indirect, that his employer's judgment was motivated by unlawful discrimination. Because the decision below is thus at odds with the principles articulated by this Court, and permits an unwarranted encroachment into traditional management prerogatives, the Court should grant review.

II. THE DECISION BELOW VIRTUALLY ELIMINATES SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES.

Resolution of the issue presented here—whether an employee can survive summary judgment in an employment discrimination case without presenting any evidence that the employer's business judgment was motivated by an intent to discriminate—is vital because the "great majority" of such cases turn on precisely that point. *See* B. Schlei and P. Grossman, *Employment Discrimination Law* 1317 (2d Ed. 1983). (The "great majority" of intentional discrimination cases "turn on plaintiff's ability to demonstrate that the nondiscriminatory reason offered by the employer was a pretext for discrimination"). The impact of the decision below, if upheld, is thus far-reaching.

To hold, as the court below does, that an employee can defeat summary judgment merely by questioning the "credence" of his employer's articulated nondiscriminatory reasons tolls the death knell for summary judgment procedure in employment discrimination cases. An employee can nearly always introduce, through affidavits, some self-serving evidence that his employer's subjective business judgment was ill-advised. Having done so, he can submit his case to the jury without any direct or

indirect evidence of intentional discrimination. Simply stated, the decision below—if it stands—means that an employer will rarely, if ever, prevail on summary judgment in an employment discrimination case.[6]

That the decision below emasculates the role of summary judgment—in contravention of the important policies embodied in Rule 56 and recognized by this Court in *Celotex*—is thus plain. As this Court has noted, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 106 S. Ct. at 2555, *quoting* Fed. R. Civ. P. 1. Its recognized purpose is "to isolate and dispose of factually unsupported claims" before trial. *Id.* at 2553. But, by essentially eliminating summary judgment in employment discrimination cases, the decision achieves the opposite result. It fosters unnecessary trials of factually unsupportable cases brought by disgruntled employees who, by the decision below, are invited to second-guess their employers' business judgments.

The impact of the decision below, moreover, on the federal court dockets is potentially substantial. As of June 30, 1986, over 10,800 private employment-related civil rights cases were pending in the federal courts.[7] During

[6] The district court understood as much:

> Plaintiffs [sic] affidavits . . . are conclusory and refer to no corroborating evidence. It would be improper for a jury to decide for plaintiffs in discrimination cases on this evidence alone. To deny summary judgment on the basis of these statements would render Rule 56 meaningless, since such claims may be pleaded by plaintiffs in all cases regardless of their other merits.

App. at 23a.

[7] Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts (1986), Table S-12 (at 115).

the 12 months preceding that date, nearly 9,200 additional employment-related civil rights cases were filed in the federal district courts, representing a 13.5 percent increase in just one year.[8] Moreover, because of the reluctance of many courts to grant summary judgment in employment discrimination cases, a higher percentage of employment-related civil rights cases go to trial than any other category of federal question and diversity cases.[9]

The number of employment-related civil rights cases reaching trial—and, concomitantly, the costs of such litigation and the demand on judicial resources—can only increase as a result of the decision below. To restore summary judgment procedure to its proper role in employment discrimination litigation, this Court should grant the Petition.

III. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS CONCERNING SUMMARY JUDGMENT IN DISCRIMINATION CASES.

The decision below—that an ADEA plaintiff can defeat summary judgment without presenting any evidence, direct or indirect, that his employer's business judgment was tainted by an intent to discriminate—conflicts with the decisions of other federal courts of appeals. Review is thus necessary to resolve this conflict.

Contrary to the decision of the court below, the First, Sixth and Seventh Circuits have concluded that an ADEA plaintiff cannot avoid summary judgment merely by challenging the employer's articulated business reasons, but must link those allegedly "pretextual" reasons to unlawful discrimination. In *Dea v. Look*, 810 F.2d 12 (1st

[8] *Id.*, Tables C-2 (at 176) and C-2A (at 179).

[9] *Id.*, Table C-4 (at 206).

Cir. 1987), for example, the First Circuit affirmed a grant of summary judgment to an employer in an age discrimination case where the plaintiff, in response to his employer's proffered reasons for his discharge, merely challenged the credibility of those reasons. The court stated:

> [E]vidence contesting the factual underpinnings of the reason for the discharge proffered by the employer is insufficient, without more, to present a jury question. Plaintiff continues to carry the burden of showing discriminatory intent, and the relevant question is whether the given reason was a pretext for discrimination: 'It is not enough for the plaintiff to show that the employer made an unwise business decision, or an unnecessary personnel move. . . . These facts, even if demonstrated, do not necessarily show that the *age* was a motivating factor.' . . . [The plaintiff] cannot meet this burden of proving 'pretext' simply by refuting or questioning the defendants' articulated reason.

Id. at 15 (citations omitted and emphasis in original). *See also White v. Vathally*, 732 F.2d 1037, 1043 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984) ("[m]erely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent"). The Sixth and Seventh Circuits have reached similar conclusions. *See Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464-65 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987) (alternative holding) (to avoid summary judgment, a plaintiff "must do more than challenge the judgment of his superiors through his own self-interested assertions"; he "must establish a nexus between his evidence and age discrimination"); *Askin v. Firestone Tire & Rubber Co.*, 785 F.2d 307 (6th Cir. 1986), *aff'd without opinion*, 600 F. Supp. 751, 753 (E.D. Ky. 1985) (showing that an employer's articulated business reasons are "unreasonable or a pretext for some arbitrary or oppressive motive" will not, in the absence

of evidence that the reasons are "a pretext for age discrimination", defeat a summary judgment motion).[10]

The court below diverges from this reasoned analysis through an unduly restrictive reading of this Court's dictum in *Burdine*—namely, that the plaintiff's ultimate

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[10] *See also Grigsby v. Reynolds Metal Co.*, 821 F.2d 590 (11th Cir. 1987) ("conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [the employer] has offered . . . extensive evidence of legitimate, nondiscriminatory reasons for its actions"); *Klein v. Trustees of Indiana University*, 766 F.2d 275, 282 (7th Cir. 1985) ("To establish that a discriminatory reason more likely motivated the employer in taking the challenged action, the plaintiff must present evidence sufficiently substantial to show that, in addition to the defendant's proffered reasons, a discriminatory motive was a determining factor"); *Pace v. Southern Railway System*, 701 F.2d 1383, 1391 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983) ("[w]here the ADEA plaintiff has shown 'no evidence "which might infer that age was even a factor in the decision"' of which plaintiff complains summary judgment is warranted"); *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983) (to avoid summary judgment based on challenges to an employer's proffered reasons, employee must produce "specific, substantial evidence of pretext and that age was a determining factor in the decision"). That a mere challenge to the truth of an employer's proffered reasons does not mean that age instead was a motivating factor is obvious from the fact that an employer may have "pretextual", but entirely benign, reasons for its action. As aptly noted by the dissent in *Chipollini*:

> An employer's proffered reason for terminating an employee may be pretextual without violating the ADEA. . . . An employer motivated by ill-will, nepotism, or unpublicized financial problems in his termination of an employee is just as likely to use a pretextual explanation for his action as is an employer motivated by statutorily-prohibited discrimination. . . . Under such circumstances, we have no power under the ADEA to provide redress.

Chipollini v. Spencer Gifts, 814 F.2d at 903 (Hunter, J., dissenting); *see also Askin v. Firestone Tire & Rubber Co.*, 600 F. Supp. at 755; *Holly v. City of Naperville*, 603 F. Supp. 220, 230-31 n.4 (N.D. Ill. 1985).

burden of persuasion on the issue of intentional discrimination can be discharged "indirectly by showing that the employer's proffered explanation is *unworthy of credence.*" 450 U.S. at 256 (emphasis added), *citing McDonnell Douglas v. Green*, 411 U.S. at 804-05.[11] Using this dictum as a springboard, the court below concluded that "to defeat a summary judgment motion based only on an employer's proffered evidence of a nondiscriminatory animus, an ADEA plaintiff's evidence need only permit a reasonable inference that the employer's proffered explanation is unworthy of credence." App. at 2a; *see also Chipollini v. Spencer Gifts*, 814 F.2d at 900.[12] But the decision below cannot be squared with a principled reading of *Burdine* and *McDonnell Douglas*. Those cases plainly require a plaintiff to prove "by competent evidence that the presumptively valid reasons for [the employment action] were in fact a coverup for a . . . *discriminatory* decision." *McDonnell Douglas v. Green*, 411 U.S. at 805 (emphasis added); *see also Texas Department of Community Affairs v. Burdine*, 450 U.S. at 253 (emphasis added) ("the plaintiff must . . . prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a *pretext for discrimination*"). *See generally*, Milone, *Age Discrimination: Proving Pretext under the ADEA*, 13 Empl. Rel. L.J. 104 (1987).

[11] The narrow issue before the Court in *Burdine* was "whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a prependerance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed." 450 U.S. at 250. As discussed earlier, the Court held that the employer's burden is one of production, not persuasion. *See* discussion *supra* at 8-11.

[12] The instant case comes to this Court in a significantly different posture than *Chipollini*. In *Chipollini*, unlike the instant case, the plaintiff presented evidence directly correlative to the truth of the employer's proffered reason. In the instant case, however, Respondent did not dispute the facts underlying his employer's judgment—i.e., that Faust had broader experience which was used by the Company for at least some portion of time—and produced no record evidence which raised a material factual dispute as to the credence of the employer's proffered reasons.

Only this Court can effectively resolve this "recurring area of confusion", *Sorba v. Pennsylvania Drilling Co.*, 821 F.2d 200 (3d Cir. 1987), as to the proper level of proof required to defeat summary judgment in an age discrimination case. This confusion—as evidenced by the conflict among the circuits—provides sufficient grounds for reviewing the decision below.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: August 17, 1987

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3068

EUGENE F. BRIECK,

vs. *Appellant*

HARBISON-WALKER REFRACTORIES,
a division of Dresser Industries

Appeal from the United States District Court
for the Western District of Pennsylvania (Pittsburgh)
(D.C. Civil No. 84-1594)

Argued October 2, 1986

Before: WEIS and MANSMANN, *Circuit Judges*, and LUDWIG, *District Judge.**

(Filed June 19, 1987)

James H. Logan, Esq. (Argued), Suite 1208 The Bank Tower, 307 Fourth Avenue, Pittsburgh, Pennsylvania 15222, Counsel for Appellant.

James P. Hollihan, Esq. (Argued), Manion McDonough & Lucas, 600 Grant Street, Suite 882, Pittsburgh, Pennsylvania 15219, Counsel for Appellee.

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* Honorable Edmund V. Ludwig of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

This appeal raises issues most recently addressed by us in banc in *Chipollini v. Spencer Gifts*, No. 85-5573, slip op. (3d Cir. March 19, 1987), regarding the appropriateness of summary judgment for the defendant employer in discrimination cases. We held in *Chipollini* that to defeat a summary judgment motion based only on an employer's proffered evidence of a non-discriminatory animus, an ADEA plaintiff's evidence need only permit a reasonable inference that the employer's proffered explanation for the discharge is unworthy of credence. We find that the record before us contains "evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge (which) reasonably *could* support an inference that the employer did not act for (those) non-discriminatory reasons." *Id.*, slip op. at 16. The district court incorrectly required that the ADEA plaintiff's evidence establish a direct inference that the employer discharged him because of his age. Therefore we will reverse the entry of summary judgment for the defendant employer.

The appellant, Eugene F. Brieck ("Brieck"), was a salaried employee of the defendant, Harbison-Walker Refractories ("Harbison-Walker") from June 1985 [sic] until July 1982 when a decline in Harbison-Walker's business necessitated a series of layoffs. Brieck complains that his age was a factor in the employer's decision to retain Hugh F..ust instead of Brieck during the first lay-off in July 1982 and to recall Faust rather than Brieck in November 1982. Faust was the only one of four installation specialists who was under 40 years of age at the time of the layoffs. Faust had less experience as an installation specialist than Brieck, and Faust had approximately 15 months less seniority with the company. There is no dispute that Brieck, who was 55 years of age at the time of his layoff, will be able to introduce

evidence in support of a prima facie case of age discrimination.

Accompanying the defendant's motion for summary judgment was the affidavit of William Sekeras who was, at the time of Brieck's layoff, Manager of Harbison-Walker's Iron & Steel Group. Sekeras made the final decision as to individual layoffs, subject to the approval of the Vice President of Marketing.

Mr. Sekeras' affidavit listed the following reasons for Faust's longer retention and eventual recall:

> 1. Faust had more diverse skills and had considerable prior experience working as a sales correspondent prior to assuming the position of installation specialist in 1978.
>
> 2. In comparing Faust and Brieck, Faust was superior in working with records and written reports, and had considerable contact in customer relations as well as in preparation of bids and quotations, an activity which remained in the reduced business environment.
>
> 3. Brieck, on the other hand was solely an installation specialist, and his narrow skills with respect to installation work primarily in BOF shops was expendable given the fact that installation work was extremely low because of the lack of sales of Harbison-Walker products during this period.
>
> 4. In addition, Faust was the only installation specialist who had experience in installation work in blast furnace casthouses, an area that had been targeted by Harbison-Walker as a growth market and an area that represented significant potential even during the 1982 period.
>
> 5. In short, Faust possessed skills for which there was still some need even in the reduced business environment, since his administration and sales cor-

respondent experience permitted him to perform other noninstallation functions in the reduced department.

6. Faust had slightly higher performance ratings than Brieck during the 1978-1981 period.

Affidavit of William Sekeras, *reprinted in* Appendix at 30a-31a.

As the district court correctly found, Brieck has introduced no evidence to counter the assertion that Faust's prior experience with office matters such as price quotations, customer contact, and setting priorities for orders from the manufacturing plan, distinguishes his qualifications from those of Brieck. The district court credited this reason and granted summary judgment for the employer, Harbison-Walker.

The district court order denying reconsideration was entered on January 10, 1986. During the pendency of this appeal, we filed our opinion in *Chipollini* where we held that an ADEA plaintiff need not produce direct evidence of age discrimination in order to resist a motion for summary judgment based on the defendant employer's proffer of a non-discriminatory reason for the plaintiff's discharge. To meet its burden on summary judgment, the defendant employer must show that the plaintiff will be unable to introduce either direct evidence of a purpose to discriminate, or indirect evidence of that purpose by showing that the proffered reason is subject to factual dispute. *Chipollini*, slip op. at 12. Where a plaintiff has offered no direct evidence of discriminatory motive, questions regarding summary judgment on the issue of intent are subsumed under the inquiry into employer pretext. *Id*, at 11. If an employee introduces "evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge (which) reasonably *could* support an inference that the employer did not act for non-discriminatory reasons," *id.* at 16, the

district court may not weigh competing inferences and resolve disputed facts in order to grant the employer's summary judgment motion.

Brieck opposed the summary judgment motion with evidence that the employer's asserted need for Faust's diverse qualifications is inconsistent with the duties actually performed by Faust during his retention and after his recall. Faust testified that seventy-five percent of his time was spent on the road doing installations. Deposition Testimony of Hugh J. Faust, *reprinted in* appendix at 325a-26a. The remaining time was spent preparing reports of installations, an activity performed by all installation specialists including Brieck, doing some filing and working on margins. *Id.*

Faust's testimony regarding his duties after recall is inconsistent with the employer's expressed need for diverse skills gained from Faust's marketing and sales experience. This evidence raises a question of fact as to whether the employer really believed that Faust's "varied" experience made him more qualified than Brieck to perform the job functions remaining in the reduced business environment.

The district court found it "plausible that the importance of an employee's related experience, whether or not frequently applied, increases under the scaled-down business operations which in fact existed." *Brieck v. Harbison-Walker Refractories*, No. 84-1594, slip op. at 6 (W.D. Pa. December 1985). However, it is equally plausible that, if the jury finds that the asserted "more varied" skills were neither employed nor required in the position for which Faust was preferred, the jury might find the employer's asserted reason for preferring Faust to be pretextual, especially in light of Brieck's arguable ability to show that he was more qualified to perform the tasks which the retained employee was in fact required to perform. The district court erred in resolving this factual dispute. The question is not whether the employer's as-

serted reason is plausible, but whether there is also evidence of record which, if credited, could render the reason implausible.

This is not to say that an employer is required to retain the most qualified employee as perceived by the jury. It is not the function of the jury to engage in a comparison of the qualifications of the applicants and to determine thereby who should have been retained or recalled. However, where the employer relies on the comparative experience and qualifications of the two as a reason for retention of a younger employee in preference to his older co-worker who is in the protected age group, the employee may avoid summary judgment by introducing evidence that the assertedly superior skills were neither required nor employed in the position in which the younger employee was retained or to which he was recalled.

The district court further asserts that "any question about the appropriateness of how Faust now spends his time edges into the area of judicial scrutiny of business decisions, which is not part of our function." Slip op. at 6. However, there is no issue regarding the appropriateness of Harbison-Walker's employment of Faust. The question on summary judgment is whether evidence of the duties actually performed by Faust upon his recall could cast doubt on the defendant's assertion that Faust was retained because of his more diverse skills. We find the answer to be in the affirmative. Therefore, we will reverse the district court's entry of summary judgment for the defendant.

Brieck also claimed that he had received assurances from his employer that he would not be laid off and that these assurances constituted a contract of employment which was breached by his subsequent layoff. By his own affidavit and deposition Brieck offered to prove that in August, 1980 and again in February, 1982, Larry Sheatsley, General Products Manager for Harbison-

Walker, assured Brieck that he need not worry about being laid off. Brieck Deposition, *reprinted in* appendix at 142a-143a and 153a-156a. Brieck also offered proof of a company policy of basing layoffs on "length of company service and skill requirements necessary to carry out the reduced business activities." Nicollela Deposition, Exhibit 2, *reprinted in* appendix at 103a-104a. Brieck had longer service than the other installation specialists and believed himself to be the most qualified. Brieck Affidavit, *reprinted in* appendix at 106a-107a. Brieck received a merit raise effective March 1, 1982 together with a laudatory note from his supervisor regarding the quality of Brieck's work. March 8, 1982, handwritten note to Eugene F. Brieck, appellant, from his immediate supervisor, Donald Jamison, *reprinted in* Supplemental Appendix of Appellant Volume II at 359a.

We agree with the district court that these alleged assurances are not legally sufficient to overcome the presumption of employment at will under Pennsylvania law. *See, Banas v. Matthews International Corp.*, 502 A.2d 637 (Pa. Super. 1985) (en banc).

Brieck also claimed tortious infliction of emotional distress. However, this claim was not pressed before the district court nor is it raised on appeal. Therefore, we will affirm the district court in treating the claim as abandoned.

In accordance with the foregoing, we will affirm the district court's entry of summary judgment on the plaintiff's claims of breach of contract and tortious infliction of emotional distress. We will reverse the summary judgment on the ADEA claim and remand the case to the district court for proceedings consistent with this opinion.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

WEIS, *Circuit Judge*, concurring and dissenting.

I concur in the majority's affirmance of the judgment in favor of defendant on the counts for breach of employment contract and tortious infliction of emotional distress. I dissent from reversal of the judgment on the age discrimination claim.

In this case, plaintiff has the burden of presenting evidence which would allow a reasonable inference that the employer's reasons for preferring Faust over plaintiff were pretextual. I agree with the district court that plaintiff failed to meet this burden.

Essentially, the plaintiff's evidence is that he believed himself to be a better qualified installation specialist than Faust. He further opines that Faust's other duties did not require as much skill as his principal installation specialist tasks demanded. Even accepting the plaintiff's subjective appraisal as fact does not lead to an inference that the employer's proffered reasons for its actions are implausible or suspect.

The plaintiff's case is defi[illegible]nt because it glosses over the critical fact that the defe[illegible]ant's dependence on the moribund steel industry had caused substantial economic losses, with more in sight. Simply unable to avoid personnel reductions, the company faced the unpleasant task of deciding which employees to lay off.

Of the four installation specialists, plaintiff was the second to be furloughed. Company evaluations rated another installation specialist, E.G. Malarich, better than plaintiff. Malarich remained on the payroll for some additional weeks. Plaintiff, younger than Malarich, cannot complain about age discrimination in the company's decision to retain him longer.

If the company needed only one installation specialist and if Faust's qualifications were as inadequate as plaintiff believes, then one would have expected defendant to

furlough Faust. But in that event, Malarich, and not plaintiff, would have been the one retained. The plaintiff's failure to address the fact that Malarich was given preference undercuts the claim of discrimination in favor of Faust at the time of the plaintiff's layoff. In other words, plaintiff must show not only that he was discriminated against in July 1982, but that Malarich as well had qualifications superior to Faust's and suffered age discrimination at that point. To prove damage from the July furlough, plaintiff must show that discrimination was a cause of his release and that he deserved preference over Malarich.

In establishing a claim based on failure to recall, Brieck must demonstrate that Malarich would not have been the one selected by the company or that he would not have been interested in returning to work. Once plaintiff clears that hurdle, as apparently the district court assumed in granting summary judgment, the question then becomes whether plaintiff has established the implausibility of the employer's stated reasons for preferring Faust. The arguments that plaintiff advances actually lends support to defendant.

Basically, plaintiff contends that because Faust spent twenty-five percent of his time after recall preparing reports of installations (an activity Brieck had performed) as well as working on "margins" and filing (tasks which Brieck neither had done nor was trained to do), the employer has failed to demonstrate its need for Faust's diverse qualifications. Preparing "margins" required the calculation of costs on projects to insure profitability, a process in which Brieck had little, if any, background. In addition to working on margins, Faust had spent ten years as a sales correspondent pricing, making bids and quotations, and processing orders. Brieck's knowledge in these fields, in comparison, was limited.

In his supplemental brief, plaintiff stated that "to the extent Faust might have had more experience in doing

margins, Brieck had had substantial experience with Harbison-Walker in doing paper work and miscellaneous office chores, he had some knowledge of the pricing, bidding and quotation practices of his employer, and he could easily have been trained to do the work previously performed by Faust before Faust became an installation specialist." Thus, plaintiff concedes that Faust had more experience in doing margins, that plaintiff had only "some knowledge of pricing, bidding and quotation practices," and that plaintiff could "easily have been trained" to perform the other functions that Faust already could do.

Furthermore, in his affidavit in opposition to the defendant's motion for summary judgment, plaintiff asserted, "[w]hile with Harbison-Walker, I had some knowledge of the pricing, bidding and quotation practices of my employer, and to the extent that my knowledge of these practices was less than Hugh Faust's, I could easily and quickly have been trained to do all the things he had to do with regard to prices, bids and quotations."

One must question, therefore, whether plaintiff has demonstrated the implausibility of the company's asserted reasons for preferring Faust when Brieck admits his skills do not match his rival's diverse abilities. When reduced company operations warrant the service of one installation specialist for only seventy-five percent of his time, efficiency requires some utilization of the remaining twenty-five percent. Although plaintiff may argue he could work as effectively for part of that time, significantly he cannot prove his ability to perform equally well for the entire 25 percent period. The concession that he, unlike his rivals, might require training only underscores the validity of the employer's reason for selecting Faust.

Chipollini is distinguishable because the plaintiff there produced evidence making suspect specific factors which the employer asserted as justification. The plaintiff in the case at hand has not done so.

Moreover, *Chipollini* must be read in light of *Anderson v. Liberty Lobby, Inc.*, —— U.S. ——, 106 S. Ct. 2505 (1986), and *Celotex Corp. v. Catrett*, —— U.S. ——, 106 S. Ct. 2548 (1986), which encourage the use of summary judgment when it is apparent that a jury could not reasonably find for one of the parties. Based on the record here, a jury could not properly decide in the plaintiff's favor.

I am persuaded that plaintiff has failed to show a dispute of fact on a material issue which would demonstrate pretext. I accordingly would affirm the district court's judgment in all respects.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-1594

EUGENE F. BRIECK and DOLORES F. BRIECK

vs.

HARBISON-WALKER REFRACTORIES,
a division of Dresser Industries

OPINION

Plaintiffs bring this action against Mr. Brieck's former employer alleging age discrimination, breach of contract, intentional infliction of emotional distress as to Mr. Brieck, and negligent infliction of emotional distress as to Mrs. Brieck. We have before us defendant's motion for summary judgment, accompanied by affidavits and excerpts from depositions, and plaintiffs' response similarly supported. In reviewing these materials we find no dispute as to relevant facts. We must now decide whether these facts adequately support the causes of action pleaded.

FACTUAL BACKGROUND

Defendant sells and installs refractory brick and related materials to producers of steel, glass and paper. Sixty percent of its market lies with the steel industry, however, and defendant asserts that its own financial success is closely linked to the fortunes of domestic steelmakers. Defendant has stated that, between 1979 and 1982, sales of refractory materials fell from $425,000,000

to $302,000,000 and profits in the same period dropped from $64,000,000 to a loss of $20,000,000.

Defendant hired Mr. Brieck in June 1965 as an installation specialist. His primary duties consisted of supervising installation of refractory materials in steel making furnaces, training the customer's employees in operation and maintenance, and troubleshooting to resolve any complaints. Brieck was one of four installation specialists attached to the Iron and Steel Marketing Support Group. The others were W.E. Meixell, A.G. Malarich, and H.J. Faust.

As a result of poor sales in early 1982, management decided to cut expenses by laying off workers. Mr. Brieck was one of six workers in the Iron and Steel Marking Support Group to be laid off in early July 1982. Of these six, two were installation specialists: Brieck, age 55, and Meixell, age 59. In late July 1982, Malarich, then age 59, also was laid off. In mid-November 1982, Faust then age 39, the last remaining installation specialist, also was laid off. Faust was the only installation specialist to be recalled, in July 1983. Mr. Brieck argues that his layoff and Faust's recall constitutes age discrimination.

Mr. Brieck also argues that defendant has breached an implied contract of employment in laying him off. Brieck apparently relies on four statements from management as establishing his implied contract. First, Brieck stated in his deposition that Larry Sheatsley, one of his supervisors, told him in August 1980 and February 1982 not to worry about being laid off. Plaintiffs' Supplemental Brief, Docket Entry No. 20, Appendix at 20 and 21. Second, in the Spring 1982 edition of a company newsletter a vice-president of human resources stated that:

> Layoffs are implemented only after an extensive review of alternatives. Obviously, layoffs, when they

> are necessary, occur in departments or operating units most affected by the business decline. Length of company service and skill requirements necessary to carry out the reduced business activities are the most important considerations. We try to do what is right and fair.

Id. at 26-27.

Finally, Brieck received a note from Donald Jamison, another supervisor, commending him and stating that, "We hope that we can continue to reward you for your fine work." *Id.* at 38.

Plaintiffs made no arguments in their briefs regarding their claims for tortious infliction of emotional distress. We will address all counts in the complaint in turn.

AGE DISCRIMINATION

As we stated in *Pierce v. New Process Company*, 580 F.Supp. 1543 (W.D. Pa. 1984), *aff'd*, 749 F.2d 27 (3d Cir. 1985), the plaintiff in an age discrimination action must establish four elements to make out a prima facie case. This accomplished, he is entitled to a rebuttable presumption of discrimination. Plaintiff must show that he (1) is in the protected age group; (2) was the subject of an adverse employment action; (3) was qualified for the position in question; and (4) was treated less favorably than younger employees. In short, plaintiff must prove that age was "a determinative factor" in an adverse decision concerning his employment. *Duffy v. Wheeling-Pittsburgh Steel Corp.*, 738 F.2d 1393, 1394 (3d Cir. 1984).

If the plaintiff makes out a prima facie case, the burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for not hiring or for discharging the plaintiff. But this is a burden of production, not persuasion. "It is sufficient if the defendant's evidence raises a genuine issue of fact as to

whether it discriminated against the plaintiff." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981) (fn. omitted).

If the defendant proffers a legitimate reason for its actions, the plaintiff resumes his burden of persuasion. To succeed, he either must prove that unlawful discrimination more likely motivated the defendant or that defendant's explanation is merely a pretext. *Id.* at 256; *Duffy, supra; Molthan v. Temple University*, No. 84-1220, slip op. (3d Cir. December 5, 1985). Where there is a reduction in force rather than a discharge or failure to hire, the plaintiff's burden obviously is modified. In such cases, the plaintiff simply must show that younger employees working in similar jobs were retained. *Duffy*, 738 F.2d at 1395, notes 2 and 3. This modification is not material here, however, since it is uncontested that defendant recalled Hugh Faust, a younger employee, in July 1983 to work as its only installation specialist in the Iron and Steel Marketing Support Group.[1]

PRIMA FACIE CASE

The burden of making out a prima facie case is not onerous, and we find that plaintiff has done so. He was 55 years old when he was laid off. He certainly was qualified to work as an installation specialist, the job now held by Faust, a younger employee.

Defendant responds with its explanation of bona fide business reasons behind its action. Of the four installation specialists, Meixell, Brieck, Malarich and Faust, Meixell was the oldest at 59, but had only two years of seniority at the time of his layoff in July 1982. Brieck was laid off at the same time. Malarich is four years older than Mr. Brieck, so his layoff is not consequential.

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[1] Brieck has shown no evidence that he was qualified to assume the responsibilities of any other job.

Faust's employment until November 1982 and recall in 1983, as characterized by plaintiff, is the offensive act.

While Faust is 16 years younger than Mr. Brieck, Brieck has only a year more seniority. In performance evaluations, Faust was rated slightly higher.[2] But the chief reason for retaining Faust, according to defendant, was his prior experience as a sales correspondent. He thus was practiced in working with records and written reports, in customer relations, and in preparing bids and quotations.

Plaintiffs attempt to expose these alleged justifications as pretext by coloring Faust's prior experience as unimportant. In his deposition, Brieck referred to Faust's former position as being that of an "office boy" and a "gofer", that is, an employee whose duties include running errands. Plaintiff's Supplemental Response in opposition, Appendix at 12 and 13. Indeed, Faust testified at his own deposition to being an office handyman when he was a staff correspondent. *Id.* at 47. But these were not and are not his principal duties, *Id.* at 42, and Brieck does not refute Faust's prior experience with office matters such as price quotations, customer contact, and setting priorities for orders from the manufacturing plant.

Mr. Brieck further attempts to downplay Faust's experience by pointing out that his knowledge of office matters actually is of no consequence to defendant since Faust spends about three-fourths of his time on installa-

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[2] The following chart summarizes key statistics involved in this case:

	Age in June 1982	Date Hired	Performance Evaluations (5 represents highest grade) 1978	1979	1980	1981
FAUST	39	Sept. 1966	4	3	3	3
BRIECK	55	June 1965	3	2	2	3

tion work. Any question about the appropriateness of how Faust now spends his time edges into the area of judicial scrutiny of business decisions, which is not part of our function. We nonetheless consider it plausible that the importance of an employee's related experience, whether or not frequently applied, increases under the scaled-down business operations which in fact existed. Without considering age, we find that Mr. Brieck, in comparison to Faust, has

1. slightly more seniority;
2. slightly poorer performance evaluations;
3. little experience in areas related to installation specialist.

We thus cannot find that age was a determinative factor in the decision to lay off Mr. Brieck.

Other facts support this finding. Prior to the June 1982 layoffs, the Iron and Steel Marketing Support Group employed 32 people, 14 of whom were above the age of 40. Of the 11 employees who subsequently were laid off, only three were more than 40 years of age. Even considering the employees who were recalled, the average age of the group was .04 of a point higher after layoffs than before. Affidavit of William Sekeras, Docket Entry No. 17, Exhibits D and E. Of course, these statistics are not themselves conclusive, but they further highlight Mr. Brieck's absence of proof that defendant's justification for his layoff is a pretext for age discrimination.

BREACH OF CONTRACT

On this claim plaintiff concedes that there is no distinct common law cause of action for breach of contract resulting from age discrimination; remedies for age discrimination must be sought under state and federal statutes enacted to address the problem. *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187 (3d Cir. 1977). Citing

DeRamo v. Consolidated Rail Corporation, 607 F.Supp. 100 (E.D. Pa. 1985), he urges that his breach of contract claim nevertheless should be considered because it is not grounded on age discrimination. Rather, without raising the issue of age discrimination, he asserts that the act of laying him off violated the terms of an implied contract of employment. We believe that this question of contract rights adequately describes a cause of action separate from the statutory claim of age discrimination and the related tort theory of wrongful discharge for age discrimination. Plaintiffs' pleadings present a claim for breach of contract without reference to age which could support a separate recovery.

Plaintiffs' adequate pleading of their contract claim, however, does not include sufficient evidence to protect them from summary judgment. As stated above, Mr. Brieck was told in August 1980 and February 1982 by Larry Sheatsley, one of his supervisors, that he should not worry about being laid off. In spring of 1982 a Dress [sic] vice-president stated in the company news letter, that in deciding on layoffs, "Length of company service and skill requirements necessary to carry out the reduced business activities are the most important considerations." Finally, a note from Brieck's immediate supervisor informing him of a merit raise stated that, "we [Dresser] hope we can continue to reward you for your good work." See pp. 2 and 3 infra. Viewing dant's [sic] statements most favorably to plaintiffs, they do not establish the violation of a contract.

The general rule in Pennsylvania has long been that contract for personal services are presumed terminable at will by either party absent some provision setting the duration of the contract. *Henry v. Pittsburgh & Lake Erie Railroad Co.*, 139 Pa. 289, 21 A. 157 (1891); *Cummings v. Kelling Nut Co.*, 368 Pa. 448, 84 A.2d 323 (1951); *Jackman v. Military Publications, Inc.*, 350 F.2d

383, (3d Cir. 1965). Plaintiff may overcome this presumption by showing that the parties did agree to a contract of definite duration or by "evidence showing that the plaintiff-employee gave the defendant-employer consideration in addition to the employee's normal services." *Gravman v. Bassett Furniture Industries, Inc.*, 552 F.2d 90, 92 (3d Cir. 1977) (footnote omitted); *See also McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979). In the latter instance, the contract is deemed to be for a reasonable time.

Mr. Brieck relies on no express written oral agreement; his evidence concerning a contract for employment rests solely in the statements above. We find this evidence insufficient to satisfy the requirement for a provision setting the length of the contract. The statements lack any reference to any future point. In *Geib v. Alan Wood Steel Co.*, 419 F. Supp. 1205 (E.D. Pa. 1976), plaintiff was granted a contract "until retirement." In *Lightcap* v. *Keaggy*, 128 Pa. Super. 348, 194 A. 347 (1937), the contract was extended for the period "so long as you live". Neither statement was found sufficient to support a cause of action. The statements on which plaintiffs rely are considerably more ambiguous. Mr. Brieck thus has not established the form of a contract which supports his claim. *Adams v. Budd Co.*, 583 F. Supp. 711 (E.D. Pa. 1984).

TORTIOUS INFLICTION OF EMOTIONAL DISTRESS

Plaintiffs make no argument regarding their claims of intentional and negligent infliction of emotional distress in either of their briefs opposing defendant's motion for summary judgment, raising the likelihood that claims have been abandoned. In any event, we find that defendant's conduct in no way rises to the level of outrageousness necessary to invoke these theories.

The Court of Appeals for the Third Circuit has determined that, under Pennsylvania law, the international branch of this tort is composed of four elements:

(1) extreme and outrageous conduct;

(2) intention or recklessness;

(3) emotional distress in the victim caused by the conduct; and

(4) distress that is severe.

Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1273 (3d Cir. 1979); Restatement (2d) of Torts, § 46(1) (1965). The extremeness of behavior associated with this tort necessarily means that it rarely will be found. One example is *Papieves v. Lawrence*, 437 Pa. 373, 263 A.2d 1118 (1970), in which the parents of a dead child recovered from an automobile driver who caused the child's death, when the driver concealed the child's body for two months. Another is *Chuy, supra*, in which a football team's physician reported to the press that a player had suffered from a potentially fatal blood disease, knowing this diagnosis was unsupported. While loss of employment is unfortunate and unquestionably causes hardships, often severe, we must acknowledge that it is a common event. It has been denied as a basis for this tort. *Cautilli v. GAF Corporation*, 531 F. Supp. 71, (E.D. Pa. 1982). Without belaboring the point, we conclude that the plaintiff clearly has not shown that defendant's conduct meets the test of extremeness required by this theory. Our finding necessarily precludes Mrs. Brieck's claim of negligent infliction of emotional distress based on defendant's same actions.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-1594

EUGENE F. BRIECK and DOLORES F. BRIECK

v.

HARBISON-WALKER REFRACTORIES,
a division of Dresser Industries

ORDER

Defendant's Motion for Summary Judgment is GRANTED, and the case is DISMISSED.

SO ORDERED this 19th day of December 1985.

/s/ Gerald J. Weber
GERALD J. WEBER
United States District Judge

cc: James H. Logan, Esq.
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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-1594

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v.

HARBISON-WALKER REFRACTORIES,
a division of Dresser Industries

MEMORANDUM OPINION

On January 8, 1986, plaintiffs moved for the Court to reconsider our December 19, 1985 Opinion and Order granting defendant's motion for summary judgment. Upon review of our actions in light of plaintiffs' exceptions, we find no grounds for relief.

Defendant's motion under Federal Rule of Civil Procedure 56 was a challenge for both parties to produce evidence. Defendant had the rigorous burden of proving the absence of factual dispute and entitlement to judgment as a matter of law; plaintiffs were held simply to show a dispute of fact. In our opinion, applying governing case law, we found that Mr. Brieck made out a prima facie case of age discrimination.

Proceeding to the next phase of analysis, we found that defendant satisfied its resulting burden by producing evidence of legitimate business reasons for its actions. Plaintiffs then were required to resume their burden of persuasion in proving that age more likely motivated defendant or that its explanation was a pretext.

In attempting to carry this burden, plaintiffs failed to forge the critical link between defendant's actions and Mr. Brieck's age with *relevant* proof. The Court understood that Mr. Brieck had received a favorable note from a superior three months before his layoff, and had been sent on international assignments. Mr. Brieck's individual level of competence was not contested. We found it unnecessary to mention these and similar facts, however, because plaintiffs did not prove how these facts were at all related to a discharge motivated by age. Plaintiffs affidavits suffer from the same fault; they are conclusory and refer to no corroborating evidence. It would be improper for a jury to decide for plaintiffs in discrimination cases on this evidence alone. To deny summary judgment on the basis of these statements would render Rule 56 meaningless, since such claims may be pleaded by plaintiffs in all cases regardless of their other merits.

Plaintiffs repeatedly cite dicta concerning the limited scope of summary judgment, but this argument again is wide of the mark, distracting from the central issue on summary judgment, reference to disputed facts. The mere incantation that disputes exist, or that summary judgment is to be narrowly applied, is unpersuasive. We did not track the language of Rule 56 in our opinion, but we have no doubt that the opinion as a whole is true to its provisions. See Typescript Opinion at 7.

Plaintiffs also protest our description of Mr. Brieck on page 6 as having "little experience in areas related to installation specialist." It appears that our use of the word "related" is stricter than counsels' understanding, since defendant, after receiving plaintiffs' motion, also seeks to have this statement amended by changing the word to "unrelated." We referred to an installation specialist as one who supervises installations of refractory material, trains customers employees in operation and maintenance, and trouble-shoots to resolve complaints. See Typescript Opinion at 2. We referred to areas re-

lated to installation specialist as those which do not involve actual installation, such as price quotations, customer contract, and factory ordering, but which are executed by other personnel before and after the installation as part of the overall business of selling refractory products. Thus, "related" was intended to convey the meaning of areas connected with installation work without actually being part of it. We found that experience in these areas distinguished the relative qualifications of Brieck and Faust. In failing to create a dispute of fact over this issue by reference to relevant proof, and thus failing to refute defendant's explanation of legitimate reasons for its actions, there was no obstacle to finding defendant entitled to judgment as a matter of law. In any event, we will attempt to clarify our opinion by adding the word "other" to our language on page 6, so that the clause will read, "little experience in other areas related to installation specialist."

Finally, plaintiffs have not identified the rule under which they file their motion. It can only fall under Rule 60 since it was not filed within 10 days of our December 19, 1985 order as required by Rule 59. *Sonnenblick-Goldman Corp. v. Nowalk*, 420 F.2d 858 (3d Cir. 1970). Under Rule 60, however, the time for filing appeal is not tolled. We therefore will enlarge the time for appeal for 10 days beyond the date of this order.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-1594

EUGENE F. BRIECK and DOLORES J. BRIECK

v.

HARBISON-WALKER REFRACTORIES,
a division of Dresser Industries

ORDER

Plaintiffs' Motion for Reconsideration of the Court's December 19, 1985 Opinion and Order is DENIED. The time for filing an appeal from that Order is enlarged for 10 days beyond the date of this order. Furthermore, the Opinion accompanying the December 19, 1985 order shall be amended in accordance with the foregoing opinion. This amendment in no way affects the judgment.

SO ORDERED this 16th day of January 1986.

/s/ Gerald J. Weber
GERALD J. WEBER
U.S. District Judge

cc: All Counsel

No. 87-271

Supreme Court, U.S.
FILED
SEP 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

HARBISON-WALKER REFRACTORIES,
A DIVISION OF DRESSER INDUSTRIES, INC.,

Petitioner,

v.

EUGENE F. BRIECK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether a plaintiff in an action brought pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. Sections 621 *et seq.*, must present direct evidence of discrimination or indirect evidence of discrimination in the form of statistical evidence, in order to survive an employer's motion for summary judgment, or may such a plaintiff produce only indirect evidence that the employer's proffered reasons are a pretext for discrimination?

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STATEMENT OF THE CASE

Petitioner's Statement of the Case is defective because of the inaccuracies included in such Statement and because of the omission of important facts from such Statement.

With regard to the inaccuracies, Petitioner states as true, matters which are in dispute. For example, Petitioner alleges that its decision to retain Faust was in part because he had broader experience than Respondent, and such allegation has been disputed by Respondent. Respondent has alleged specific facts showing that he had greater experience than Faust, including Respondent's being the only one of the four installation specialists to have been sent out on international assignments, the most recent such assignment having been to Turkey shortly before his permanent layoff (Record on Appeal at 106a-107a, 165a, 359a), and his having worked for Petitioner for nearly 17 years as an installation specialist (Record on Appeal at 7a-8a, 295a), whereas Faust had worked as an installation specialist at most for only three to four years as of July, 1982 (Record on Appeal at 304a-310a); none of these matters have been rebutted in any way by Petitioner.

Petitioner alleges that the decision to retain Faust was based also on his having "slightly higher performance ratings than Respondent." Petition at 3. However, an internal memorandum from F.P. Shonkwiler to Petitioner's Manager of Employee Relations, John M. Nicolella, stated that Faust and Respondent had identical ratings for the years 1981 and 1982. (Record on Appeal at 277a-278a, 294a-295a). Equally important was the admission by Donald Jamison, Respondent's immediate supervisor for the period from 1975-76 until Respondent was laid off in July, 1982, that he

had "always" rated Respondent a "3", which was "fully satisfactory" in Petitioner's rating system. (Record on Appeal at 235a, 331a-332a). Such information directly contradicts sworn statements of several of Petitioner's managers that Respondent had received a "2", or fair, rating in 1979 and 1980 (Record on Appeal at 31a, 332a). Also, in March, 1982, Respondent received a laudatory note from his supervisor, along with a merit raise, and was about to be sent to Turkey on an international refractory installation (Record on Appeal at 9a, 359a), whereas there is no evidence that Faust had received a merit raise or any laudatory memoranda.

Petitioner alleges that part of its decision to retain Faust was that Faust, "unlike Respondent," had "experience in installation work in blast furnace casthouses". Petition at 3. However, Respondent has challenged such allegation in the various materials submitted to the district court in opposition to Petitioner's motion for summary judgment. For example, Respondent indicated that he had "hit them all", referring to all types of refractory installations, and specifying the types of installations where he had experience, which included blast furnace casthouses. (Record on Appeal at 94a, 118a-119a)

With regard to the omissions from Petitioner's Statement of the Case, Petitioner conveniently failed to indicate that of the four installation specialists employed in Petitioner's Iron and Steel Marketing Support Group immediately before the layoff of installation specialists which began in July, 1982, only Hugh Faust was less than forty years old; all of the other three installation specialists were over forty years old, and in the protected age group. Faust was the last of these four installation specialists to

be laid off, his temporary layoff not beginning until mid-November, 1982. (Record on Appeal at 105a, 299a). Faust was the only one of the four installation specialists to be permanently recalled (Record on Appeal at 299a-300a), and is the only one who remains as an employee of Petitioner.

Petitioner also omitted mention of its own written policy, disseminated to its employees in its employee newsletter, regarding the considerations to be used by Petitioner in determining which employees to lay off; in the words of Petitioner's Senior Vice-President Ralph Ytterberg, Petitioner would lay off based on two factors: the ability to do the remaining job skills, and length of company service. (Record on Appeal at 9a-10a, 103a-104a). Although Faust had less seniority than Respondent, and although he lacked experience in certain types of installations such as degassers and open hearths (Record on Appeal at 105a, 323a), Faust was retained, and Respondent received a permanent layoff, despite his having the greatest seniority of any of the four installation specialists (Record on Appeal at 105a). With regard to the relative ability to perform the job skills remaining, there is a dispute between the parties as to whether Faust had greater skills, or whether Respondent had more skills. (Record on Appeal at 106a-108a, 118a-119a, 122a-123a, 128a-129a, 139a-141a).

The Proceedings Below

Petitioner conveniently fails to mention important materials submitted by Respondent in opposing Petitioner's motion for summary judgment, and misstates the proceedings below. Contrary to Petitioner's suggestion that Respondent "did not dispute that Faust had more diverse experience, and that, from time to time, Harbison-Walker

utilized 'hat experience'', Petition at 4, Respondent presented idence indicating that following the layoff of the three installation specialists over age 40, any utilization by Petitioner of that part of Faust's skills related to margins, was for an extremely small portion of Faust's time. Faust himself indicated that of the 25 per cent of his time spent in the office, as opposed to the 75 per cent of his time spent on the road supervising refractory installations, such 25 per cent of his time was spent in preparing reports such as all the installation specialists, including Faust and Respondent, had always prepared, in doing margins, in filing, and in doing "gofer" work. (Record on Appeal at 299a-302a, 316a-317a, 324a-326a). Respondent indicated that he could easily have done any of such tasks as Faust performed while in the office. (Record on Appeal at 106a-108a).

Petitioner also misstates Respondent's position, when it states that Petitioner in opposing the motion for summary judgment, "questioned only the Company's business judgment that such diverse experience was utilized enough to justify Faust's, and not Respondent's, recall". Petition at 4.

Petitioner indicates that the United States Court of Appeals for the Third Circuit in reversing the district court, relied "solely on its recent decision in *Chipollini v. Spencer Gifts*, 814 F.2d 893 (3d Cir. 1987) (*en banc*), *petition for cert. filed*, 55 U.S.L.W. 3872 (U.S. June 17, 1987) (No. 86-2007. . . ." Petition at 5. Although it is true that the only case cited by the Third Circuit in the decision below was *Chipollini*, the Third Circuit in its opinion in *Chipolini*, issued a scant three months before it issued its opinion in the instant case, relied heavily on the decisions of the United States Supreme Court in *Trans World Airlines v.*

Thurston, 469 U.S. 111 (1985), *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

SUMMARY OF ARGUMENT

I. The decision below does not conflict with principles established by the United States Supreme Court.

A. The decision below was in keeping with well-established principles of the United States Supreme Court, as enunciated in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *Furnco Construction Corporation v. Waters*, 438 U.S. 567 (1978).

B. Petitioner has distorted the record evidence and the decision below, and has ignored the main thrust of the recent decision of the United States Court of Appeals for the Third Circuit in *Chipollini v. Spencer Gifts*, 814 F.2d 893 (3d Cir. 1987) (*en banc*), *petition for cert. filed*, 55 U.S.L.W. 3872 (June 17, 1987) (No. 86-2007).

C. Respondent has presented the sufficient quality and quantum of indirect evidence necessary to rebut the reasons proffered by Petitioner in justification of its failure to retain Respondent, and the sufficient quality and quantum of indirect evidence necessary to survive Petitioner's motion for summary judgment.

II. Summary judgment is still available for dismissal of frivolous or inconsequential claims; however, the instant case is not such a case.

III. The decision below does not conflict with decisions of other courts of appeals.

—o—

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH PRINCIPLES ESTABLISHED BY THIS COURT.

The decision below of the Court of Appeals for the Third Circuit was merely an application of existing and well-established principles as set forth in *Trans World Airlines v. Thurston, United States Postal Service Board of Governors v. Aikens, Texas Department of Community Affairs v. Burdine, Furnco Construction Corp. v. Waters,* and *McDonnell Douglas Corp. v. Green.* Petitioner is most inaccurate in stating that Respondent is "merely . . . questioning his employer's business judgment, without presenting any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate." Petition at 7. Such argument depends on a distortion of the record, and Petitioner has indeed distorted the record, as indicated above in Respondent's Statement of the Case.

Petitioner argues essentially that the method set forth in *Aikens, Burdine* and *Furnco* for an employment discrimination plaintiff to establish that the employer acted with an intent to discriminate, should be changed. The import of Petitioner's argument is that the only method that should be afforded an employee to rebut an employer's articulated legitimate non-discriminatory business reason, is direct evidence, by way of presentation of "smoking gun" evidence,

or indirect evidence, apparently meaning statistical evidence, such as that which would be used in a disproportionate impact employment discrimination case as opposed to a disparate treatment case, such as the instant case. That is not the method set forth in the above-mentioned decisions of the United States Supreme Court.

A. The Decision Below Does Not Contravene This Court's Allocation of Evidentiary Burdens in Employment Discrimination Cases and Standards for Summary Judgment.

Petitioner relies on language in *Celotex Corp. v. Catrett,* — U.S. —, 106 S. Ct. 2548 (1986), which indicated in part that the non-moving party's "complete failure of proof concerning an essential element of the non-moving party's case renders all other facts immaterial." *Id.,* at 2552-53. Petitioner then concludes that this language, when read in conjunction with other Supreme Court decisions concerning the standards governing the summary judgment procedure and in conjunction with the shifting burden of production cases, requires Respondent "to adduce—as he would have to at trial—sufficient evidence to support the essential element of his case: that he was the victim of discrimination 'because of his age' ". Petition at 10. It becomes clear from the rest of its argument that the only method acceptable to Petitioner is "smoking gun" evidence or statistical evidence of the type to be used in a disproportionate impact case, as opposed to a disparate treatment case such as the instant case.

Petitioner grossly distors the record when it claims that the Third Circuit decision in the instant case permits an employment discrimination plaintiff such as Respondent to survive a motion for summary judgment "simply by

second-guessing his employer's business judgment, even though he admits all of the facts underlying that judgment, even though the legally mandatory inference of unlawful discrimination has 'dropped from the case' . . ., and even though he has produced no specific evidence, direct or indirect, that the employer's judgment was really motivated by intentional discrimination." Petition at 10-11. This is an unprincipled reading of the Third Circuit decision below, especially when read in conjunction with the Third Circuit's recently-decided 9-1 *en banc* decision in *Chipollini v. Spencer Gifts,* which decision was referred to in the decision below. The Third Circuit in the decision below and in *Chipollini v. Spencer Gifts* was merely applying well-established principles enunciated by the Supreme Court.

Respondent did more than merely question his employer's business judgment. As indicated in Respondent's Statement of the Case, Respondent produced evidence to establish that Faust, the only one of the four installation specialists under age 40, was the last of the four installation specialists to be laid off, and the only one following the layoffs to be permanently recalled.

As set forth in Respondent's Statement of the Case, Respondent also presented evidence showing inconsistencies and implausibilities in the two basic proffered reasons for the favorable treatment of Faust, i.e., Faust's allegedly broader experience and more versatile skills, and his allegedly having higher performance ratings than Respondent. In addition, Respondent produced evidence to show that Petitioner by selecting Respondent for permanent layoff and by retaining Faust, violated its own stated policy favoring the employee with greater company seniority.

Petitioner further raises the spurious argument that the decision below imposes upon an employer "a virtually unattainable [burden]: to show that the plaintiff will be 'unable' to create some factual dispute concerning the employer's proffered reasons." Petition at 11. Petitioner embellishes such spurious argument by stating,

> . . . [A]n employer in the Third Circuit can prevail on summary judgment in an employment discrimination case only if it convinces the court that its business judgment is unimpeachable. Further . . . the decision below relieves the ADEA plaintiff of his obligation to produce specific facts concerning an essential element of his case—intentional discrimination on the basis of age—in order to defeat summary judgment. Petition at 11.

Among other consequences, Petitioner's argument would deprive Respondent of any opportunity to test before a jury the credibility of Respondent's witnesses. Petitioner's argument would result in a standard whereby merely by mouthing the alleged reasons, an employer would not have its articulated reason challenged before a jury, in the absence of direct evidence or statistical evidence such as would be used in a disproportionate impact case.

B. The Decision Below Does Not Contravene This Court's Recognition That the ADEA Should Not Interfere With Traditional Business Judgments.

Although Petitioner cites numerous cases for the proposition that a court must be careful not to intervene in business judgments, its argument regarding the instant case is based upon a continued distortion of the record evidence and of the decision below, and upon ignoring the Third Circuit's en banc decision in *Chipollini v. Spencer Gifts.*

Petitioner intimates that Respondent has not come forth with any evidence, and has merely raised a "subjective disagreement" with his employer's business judgment. Petition at 11. Those may be the facts in some other case, but they are not the facts in the instant case. Moreover, although Petitioner may want the ultimate fact-finder to make such a conclusion at trial, it is highly inappropriate for a court to make such a conclusion at the summary judgment stage under the facts of the instant case. The recent Supreme Court cases regarding standards to govern motions for summary judgment do not change the overriding principle that summary judgment should not be used as a vehicle for substitution of the opinion of the district judge of the evidence presented, for the opinion of a jury. As stated by the Third Circuit in *Chipollini v. Spencer Gifts,*

> In the context of the summary judgment motion, . . . the court should have considered whether evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge reasonably *could* support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence *necessarily* leads to that conclusion that the employer did act for discriminatory reasons . . . The district court erred in weighing competing inferences and in resolving disputed facts. *Id.*, at 900. (Emphasis in original.) (Citation omitted.)

The standard desired by Petitioner would make it impossible for most victims of discrimination to prevail in the absence of direct evidence of discrimination. Such a standard is not in keeping with established law. The correct standard was stated by the Third Circuit in *Chipollini v. Spencer Gifts,* as follows:

> A defendant which is less than honest in proffering its reason to discharge risks an unnecessary age discrimination verdict. . . . [T]he McDonnell Douglas test is based on the Supreme Court's assumption that "when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer based his decision on an impermissible consideration such as [age]." Furnco [Construction Corp. v. Waters], 438 U.S. [567] at 577. . . . If the plaintiff convinces the trier of fact that it is more likely than not that the employer did not act for its proffered reason, then the employer's decision remains unexplained and the inferences from the evidence produced by the plaintiff may be sufficient to prove the ultimate fact of discriminatory intent in accordance with the [United States Postal Service Board of Governors v.] Aikens standard. *Id.*, at 899.

The actions of the district court which were criticized in *Chipollini* were very similar to the actions of the district court in the instant case. The Third Circuit's reversal of the district court in the instant case was proper, and was merely an application of existing principles and standards enunciated by the Supreme Court.

II. THE DECISION BELOW DOES NOT VIRTUALLY ELIMINATE SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES.

Once again, Petitioner distorts the record evidence as well as the Third Circuit decision below, and ignores the Third Circuit decision in *Chipollini v. Spencer Gifts,* when it argues that the decision below means that "an employee can defeat summary judgment merely by questioning the 'credence' of his employer's articulated nondiscriminatory reasons", Petition at 13. Respondent did not "merely question" his employer's stated reasons, i.e., he did not

merely say, "That isn't true." He produced evidence directly contesting such stated reasons, such as the evidence summarized in Respondent's Statement of the Case, and he also called into substantial doubt whether the stated reasons were the real reasons, by quoting statements from Petitioner's employees, including Faust, Respondent's immediate supervisor Donald Jamison, F.P. Shonkwiler, Manager of Employee Relations Nicolella, and Senior Vice-President Ytterberg; such statements conflict with the stated reasons or serve to render the stated reasons implausible, and thereby substantial doubt is cast on the credibility of the stated reasons.

Employers still may use the summary judgment procedure to obtain dismissal of frivolous or inconsequential claims of age discrimination. However, summary judgment should not be used in a substantial case such as the instant case.

III. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS CONCERNING SUMMARY JUDGMENT IN DISCRIMINATION CASES.

In arguing that there is a conflict in the decisions of the courts of appeals, Petitioner once again distorts the record evidence and the Third Circuit decision below, and ignores the recent *en banc* decision of the Third Circuit in *Chipollini v. Spencer Gifts*. Petitioner distorts the meaning of the decision below in alleging that it stands for the proposition "that an ADEA plaintiff can defeat summary judgment, without presenting any evidence, direct or indirect, that his employer's business judgment was tainted by an intent to discriminate". Petition at 15. This clearly is not

what the decision below stands for, nor does the *Chipollini* decision cited by the Third Circuit in the decision below indicate anything of the sort.

Such a ridiculous distortion of the decision below is compounded by Petitioner's spurious allegation that Respondent failed to introduce any indirect evidence. As pointed out above in Respondent's Statement of the Case and in Arguments I and II, Respondent presented evidence directly challenging the reasons proffered by Petitioner in justification of the preferential treatment of Faust. As stated above, Respondent produced statements from Petitioner's own managers, including F.P. Shonkwiler and Respondent's immediate supervisor Donald Jamison, which were inconsistent with the proffered reason that Faust had higher performance ratings than Respondent. Moreover, as set forth above, Respondent in his deposition testimony and in his affidavit in opposition to the employer's motion for summary judgment, directly challenged the assertion that Faust had greater job-related experience than Respondent.

With regard to the alleged conflict in the decisions of the courts of appeals, the decisions of the First, Sixth and Seventh Circuit Courts of Appeals cited by Petitioner either failed to follow the clearly-established principles set forth in the Supreme Court decisions of *Aikens, Burdine* and *Furnco*, or are factually distinguishable from the decision below and from *Chipollini v. Spencer Gifts*. For example, *White v. Vathally*, 732 F.2d 1037 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984), was a case cited by Petitioner for the proposition that "merely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent," 732 F.2d at 1043. However, Petitioner conveniently failed

to mention that such case was not a summary judgment case, but one arising from the district court's entry of judgment following a full non-jury trial, where the employee was given an opportunity to cross-examine the employer's witnesses, and where the court had an opportunity to observe witnesses and to weigh their credibility.

With regard to *Dea v. Look*, 810 F.2d 12 (1st Cir. 1987), Respondent submits that this was a decision which did not follow the Supreme Court decisions in *Aikens, Burdine* and *Furnco*. For example, the First Circuit stated that even if an employee were to refute the employer's proffered reasons, this would not be enough for the employee to survive a motion for summary judgment. The First Circuit thus applied an incorrect standard. Although it does not clearly say what type and amount of evidence would be necessary, the impression left by *Dea v. Look* is that in the First Circuit, an employee in order to survive a motion for summary judgment must produce direct evidence, or indirect evidence in the form of statistics showing a statistical disparity against persons over age 40. The First Circuit in failing to follow the dictates of *Aikens, Burdine* and *Furnco*, has made it nearly impossible for an employee to prevail in a discrimination case. The Sixth Circuit in *Askin v. Firestone Tire & Rubber Co.*, 785 F.2d 307 (6th Cir. 1986), *aff'g without opinion*, 600 F. Supp. 751 (E.D. Ky. 1985), also failed to follow the above-mentioned Supreme Court decisions.

The instant case is factually distinguishable from *Dale v. Chicago Tribune Co.*, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987), in that in *Dale*, the Seventh Circuit indicated the employee had merely made "self-interested assertions" in opposing the proffered reasons,

whereas in the instant case, Respondent produced evidence of Faust's actual job duties following Respondent's layoff, and produced statements from Petitioner's own managers, in rebuttal of the employer's proffered reasons.

There is no conflict in the circuits. The decisions of the Courts of Appeals for the First, Sixth and Seventh Circuits cited by Petitioner, either are factually distinguishable from the instant case, or failed to follow the Supreme Court decisions in *Aikens, Burdine* and *Furnco;* it is those aberrant cases which are the source of confusion, not cases like the decision below and the Third Circuit decision in *Chipollini v. Spencer Gifts*. However, even the existence of confusion of this sort does not arise to the type of conflict between the courts of appeals which would require the grant of certiorari.

—o—

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HARBISON-WALKER REFRACTORIES,
A Division of Dresser Industries, Inc.,
Petitioner,

v.

EUGENE F. BRIECK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED AUGUST 17, 1987
PETITION FOR WRIT OF CERTIORARI GRANTED MARCH 21, 1988

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RELEVANT DOCKET ENTRIES

I. United States District Court for the Western District of Pennsylvania

1. June 29, 1984 —Complaint filed
2. August 13, 1984 —Answer filed
3. July 5, 1985 —Petitioner's Motion for Summary Judgment filed
4. August 1, 1985 —Respondent's Opposition to Motion for Summary Judgment filed
5. August 12, 1985 —Respondent's Supplemental Opposition to Motion for Summary Judgment filed
6. December 19, 1985 —Opinion filed
7. January 8, 1986 —Respondent's Motion for Reconsideration filed
8. January 16, 1986 —Memorandum Opinion and Order entered
9. January 17, 1986 —Respondent's Notice of Appeal filed

II. United States Court of Appeals for the Third Circuit

1. October 2, 1986 —Arguments heard
2. June 19, 1987 —Opinion filed

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-1594

JURY TRIAL DEMANDED

EUGENE F. BRIECK and DOLORES J. BRIECK,
Plaintiffs,

v.

HARBISON-WALKER REFRACTORIES,
A Division of Dresser Industries,
Defendant.

COMPLAINT FOR DAMAGES AND FOR DECLARATORY AND INJUNCTIVE RELIEF

AND NOW this 29th day of June, 1984, comes Plaintiffs above named, by and through their attorney, James H. Logan, Esquire, and file this Complaint, respectfully alleging the following:

JURISDICTION

1. Plaintiffs bring this action for damages and for declaratory and injunctive relief pursuant to the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Sec. 621 et seq., and they bring as claims either under diversity of citizenship or as pendent claims arising under Pennsylvania law, a breach of contract claim and claims for the tort of intentional infliction of emotional distress and negligent infliction of emotional distress.

* * * *

PARTIES

3. Plaintiff, Eugene F. Brieck, is a citizen of the United States of America, resides at 45B Hall Drive,

Turtle Creek, Allegheny County, Pennsylvania, 15145, and is the chronological age of 57 years.

* * * *

5. Defendant, Harbison-Walker Refractories, a division of Dresser Industries, is a corporation incorporated under the laws of the State of Delaware, with offices located at Two Gateway Center, Pittsburgh, Allegheny County, Pennsylvania, 15222.

AS AND FOR A FIRST CAUSE OF ACTION

Eugene F. Brieck v. Harbison-Walker Refractories, a division of Dresser Industries

6. Plaintiff, Eugene F. Brieck, was initially hired by Defendant on or about June 7, 1965; and he worked continuously with Defendant from that date until on or about July 2, 1982, when he was informed by Defendant that he would be laid off permanently.

7. During the period of Plaintiff, Eugene F. Brieck's, employment with Defendant, he received a steady series of pay increases, his base annual salary having increased to over $26,000 during the last year of his employment with Defendant.

8. Plaintiff, Eugene F. Brieck's, job position was installation specialist, his primary duties consisting of the following:

a. he supervised the installation of refractories for steel-making furnaces, traveling not only in the United States, but also having duties that took him to Chile, Brazil, Argentina, Italy, Turkey, Canada, and Mexico;

b. he acted as a trouble-shooter to handle customer complaints or problems; and,

c. he trained the customer's employees in the operation and maintenance of refractory installations.

9. During the course of his employment with Defendant, Plaintiff, Eugene F. Brieck, always performed his duties in a highly competent fashion.

10. During the course of his employment with Defendant, all of the evaluations received by Plaintiff, Eugene F. Brieck, indicated above-average or at least satisfactory work performance by him.

11. During the entire course of his employment with Defendant, Plaintiff, Eugene F. Brieck, received numerous laudatory comments, orally or in writing, from his supervisors, from other employees, and from customers of Defendant, regarding his work performance.

12. During the entire course of his employment, Plaintiff, Eugene F. Brieck, was never suspended, demoted, reprimanded, warned, or in any way disciplined concerning any aspect of his job performance.

13. In March, 1982, Plaintiff Eugene F. Brieck, received a merit raise and along with such raise he received a note dated March 24, 1982, from his supervisor, Donald Jamison, Applications Engineer, which stated in part the following:

> ". . . The merit raise is well deserved and we hope that we can continue to reward you for your good work. . . . Again, thanks for your fine efforts["].

14. On or about July 2, 1982, Plaintiff, Eugene F. Brieck, was called into the office of Lawrence L. Sheatsley, General Products Manager, at approximately 4:20 p.m.; and in the presence of Donald Jamison, Plaintiff was informed by Sheatsley that he was being immediately and permanently laid off. Plaintiff asked, "Why me", and he was informed by Sheatsley, "We have to start somewhere". Plaintiff was the first person in the Pittsburgh Product Support Department to be given such a layoff. His employment with Defendant of over 17 consecutive years thus was effectively terminated within 10 minutes with no prior notice to Plaintiff.

15. Plaintiff, Eugene F. Brieck, believes and avers that the permanent layoff of Plaintiff was in violation of Defendant's stated policy, which policy was manifested in part by the verbatim report of an interview with Ralph Ytterberg, Senior Vice President-Human Resources of Dresser Industries, appearing in the Spring, 1982, edition of the Dresser Industries Company newspaper, "Dresser News". In response to a question from the interviewer, "How do you determine who gets laid off?", Senior Vice President Ytterbreg [sic] stated in part the following:

> ". . . [L]ayoffs are implemented only after an extensive review of alternatives. Obviously, layoffs, when they are necessary, occur in departments or operating units most affected by the business decline. Length of company service and skill requirements necessary to carry out the reduced business activities are the most important considerations. We try to do what is right and fair. . . ."

16. Defendant's permanent layoff of Plaintiff, Eugene F. Brieck, was motivated by the improper and unlawful consideration of age, as evidenced in part by the following:

a. Defendant retained younger, less experienced, less skilled employees with less company seniority than Plaintiff, rather than laying off these employees, in part because Plaintiff's salary was higher than such employees, and in part because of Plaintiff's age; such a practice was in violation of Defendant's stated policy, as set forth above;

b. Upon information and belief, Defendant has begun to hire new employees under the age of 40, with less relevant skills and experience than Plaintiff, rather than to recall Plaintiff;

c. Upon information and belief, Defendant laid off a number of higher-salaried employees over age 40 who

had considerable company seniority and gave their duties to employees under the age of 40 who had much less company seniority and less skills and experience;

d. Defendant failed to transfer Plaintiff to another department or to retrain him, choosing instead to train younger, less experienced, less skillful people to do duties that with proper training and/or orientation Plaintiff could easily have done. Plaintiff was willing to take a cut in pay if necessary but this option was not provided to him.

17. In putting Plaintiff, Eugene F. Brieck, on permanent layoff status, Defendant in essence terminated Plaintiff's employment; and Defendant should have known how difficult if not impossible it would be and has in fact been for Plaintiff to find similar employment at his chronological age. Defendant's termination of Plaintiff's employment caused Plaintiff not only damages in the form of deprivation of earnings and benefits, but also damages in the form of bodily distress, anxiety, stress, embarrassment, humiliation, pain and suffering. Further, Plaintiff has incurred and will incur attorneys' fees and court costs and expenses.

18. In terminating Plaintiff, Eugene F. Brieck's, employment in the manner set forth above, Defendant acted in bad faith, willfully, intentionally, recklessly, wantonly, outrageously, and maliciously, with disregard for the law, and violated the Age Discrimination in Employment Act.

19. On or about July 19, 1982, Plaintiff filed a complaint of age discrimination with the Pennsylvania Human Relations Commission, and such complaint was cross-filed as a charge with the Equal Employment Opportunity Commission (EEOC).

20. All administrative prerequisites to the filing of the instant Complaint with this Court have been met.

WHEREFORE, Plaintiff, Eugene F. Brieck, respectfully prays this Honorable Court to grant him the following relief:

a. The issuance of an injunction directing Defendant to reinstate Plaintiff to the job position which he held at the date of the termination of his employment or to the job position to which he would now be entitled, and to restore to him all employment benefits to which he would be entitled;

b. all back pay and other benefits to which he would be entitled, plus prejudgment interest at the lawful rate;

c. The issuance of a judgment declaring that the termination of Plaintiff's employment was in violation of his right to be free from age discrimination in employment, as guaranteed to him by the Age Discrimination in Employment Act;

d. Compensatory and punitive damages in an amount to be determined by a jury;

e. Attorney's fees and costs and expenses of litigation;

f. Such other and further relief as may be appropriate.

JURY TRIAL DEMANDED

• • • •

[Summons Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DIST[illegible] OF PENNSYLVANIA

[Title Omitted in Printing]

ANSWER AND DEFENSES OF DEFENDANT HARBISON-WALKER REFRACTORIES

Filed August 13, 1984

NOW COMES defendant, Harbison-Walker Refractories ("Harbison-Walker"), by and through their undersigned counsel, and file the following Answer and Defenses to plaintiffs' Complaint:

FIRST DEFENSE

1. As answer to paragraph 1 of the Complaint, defendant Harbison-Walker admits that plaintiffs' have brought this action for damages and declaratory and injunctive relief pursuant to the Age Discrimination in Employment Act of 1967, and pursuant to diversity of citizenship or pendent jurisdiction, but denies that this Court has jurisdiction under any of these bases.

* * * *

3. The allegations contained in paragraph 3 of the Complaint are admitted.

* * * *

5. The allegations contained in paragraph 5 of the Complaint are admitted, except that defendant's address is now One Gateway Center.

First Cause Of Action

6. As answer to paragraph 6 of the Complaint, defendant Harbison-Walker admits that plaintiff Eugene F. Brieck was hired on or about June 7, 1965 and worked for Harbison-Walker until July 2, 1982, when he was laid off because of a sharp decline in defendant's business. The remaining allegations set forth in paragraph 6 of the Complaint are denied.

7. As answer to paragraph 7 of the Complaint, defendant Harbison-Walker admits that during the period of his employment plaintiff received salary increases, and that at the time of his layoff his monthly salary was $2,177.00. The remaining allegations contained in paragraph 7 of the Complaint are denied.

8. The allegations contained in paragraph 8 of the Complaint are denied.

9. The allegations contained in paragraph 9 of the Complaint are denied.

10. The allegations contained in paragraph 10 of the Complaint are denied.

11. The allegations contained in paragraph 11 of the Complaint are denied.

12. The allegations contained in paragraph 12 of the Complaint are denied.

13. After reasonable investigation defendant Harbison-Walker is without information or knowledge to form a belief as to the truth of the allegations contained in paragraph 13 of the Complaint, and said allegations are therefore denied. As further answer, to the extent that such a note as that referred to in paragraph 13 exists, said note speaks for itself.

14-18. The allegations contained in paragraphs 14 through 18 of the Complaint are denied.

19. The allegations contained in paragraph 19 of the Complaint are admitted.

20. The allegations contained in paragraph 20 of the Complaint are denied.

WHEREFORE, defendant Harbison-Walker respectfully requests that plaintiffs' First Cause of Action be dismissed with prejudice and that defendant Harbison-Walker be awarded its costs and attorneys fees in defending this action.

* * * *

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

MOTION OF DEFENDANT FOR SUMMARY JUDGMENT

Filed July 5, 1985

NOW COMES DEFENDANT, Dresser Industries, Inc., by and through its undersigned counsel and moves the Court for an Order granting Summary Judgment in its favor on all claims set forth in plaintiff's Complaint, on the grounds that the pleadings, answers to interrogatories, documents produced in response to requests for production, depositions, and affidavits show that there is no genuine issue of material fact and that defendant is entitled to judgment as a matter of law.

/s/ James P. Hollihan
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600 Grant Street—5th Floor
Pittsburgh, PA 15219
Counsel for Defendant

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

AFFIDAVIT OF WILLIAM SEKERAS
IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

COMMONWEALTH OF PENNSYLVANIA)
) ss:
COUNTY OF ALLEGHENY)

NOW COMES William Sekeras who being duly sworn according to law deposes and states as follows:

1. I am presently employed by Harbison-Walker Division of Dresser Industries, Inc. ("Dresser Industries") in the position of Vice President of Marketing. I assumed that position on November 1, 1983. Prior to assuming the position of Vice President of Marketing, I was Manager of the Iron and Steel Marketing Group, and was the immediate supervisor of Larry Sheatsley, who was the General Products Manager of the Iron and Steel Marketing Support Group.

2. During calendar year 1982, Harbison-Walker Division of Dresser suffered a tremendous decrease in sales revenue. This decrease in revenue was based primarily upon the impact of the decline in the domestic steel market, which was the primary market for Harbison-Walker products. The decline in Harbison-Walker business is reflected in financial data set forth in the 1982 and 1983 Annual Reports of Dresser Industries, true and correct copies of which are attached hereto as Exhibits A and B respectively.

3. Because of the reduced level of business in 1982, Dresser took steps to minimize its losses by reducing its workforce. In April, 1982 a voluntary retirement program was instituted, under which employees with certain amount of service with the company were permitted to choose voluntary early retirement. A true and correct copy of the memorandum describing this voluntary retirement program is attached hereto as Exhibit C.

4. Even with the reduction in force created by the voluntary retirement program described in paragraph 3 herein, it became necessary for additional reductions in force in light of the depressed economic conditions and the continued decline in Harbison-Walker sales revenue and the concomitant increase in losses. In June, 1982, Harbison-Walker was required by declining business conditions to reduce salaried workforce by 10 percent. Consistent with that objective, I instructed Larry Sheatsley to recommend the appropriate number of individuals from the Iron and Steel Marketing Support Group for temporary furlough. I advised Mr. Sheatsley that the primary consideration in determining who should be furloughed and who should be retained was the ability of employees to perform the job functions remaining in the reduced business setting.

5. Later during 1982 I was instructed to reduce the workforce under my supervision even further, and additional temporary furloughs were effected. This process continued through November, 1982 because Harbison-Walker business continued to decline during that period.

6. Attached hereto as Exhibit D is a list of those employees who were employed in the Iron and Steel Marketing Support Group (excluding secretaries) prior to the institution of the layoffs in June, 1982. The information set forth on Exhibit D as to the title, age, and seniority date of these employees is derived from the personnel files of these employees.

7. Attached hereto as Exhibit E is a list of employees employed in the Iron and Steel Marketing Support Group (excluding secretaries) as of December, 1982 following

the layoff process. Again, information as to the title, age and seniority date of these employees has been derived from the personnel file of these employees.

8. Attached hereto as Exhibit F is a list of those employees who during the period July, 1982 through November, 1982 were furloughed from the Iron and Steel Marketing Support Group. In all of these cases, the names of these individuals were recommended for furlough by Mr. Sheatsley pursuant to my instructions, and I made the final decision as to the layoffs, subject to approval of F. Shonkwiler, the Vice President of Marketing and, if necessary, corporate headquarters.

9. Of the four installation specialists employed in the Iron and Steel Marketing Support Group as of June, 1982, Hugh Faust was retained longer than the other three, and was not laid off until November, 1982. The principal reason underlying Faust's retention over the other three installation specialists, including Eugene Brieck, was that Faust had more diverse skills and had considerable prior experience working as a sales correspondent prior to assuming the position of installation specialist in 1978. In comparing Faust and Brieck, Faust was superior in working with records and written reports, and had considerable contact in customer relations as well as in preparation of bids and quotations, an activity which remained in the reduced business environment. Brieck, on the other hand, was solely an installation specialist, and his narrow skills with respect to installation work primarily in BOF shops were expendable given the fact that installation work was extremely low because of the lack of sales of Harbison-Walker products during this period. In addition, Faust was the only installation specialist who had experience in installation work in blast furnace casthouses, an area that had been targeted by Harbison-Walker as a growth market and an area that represented significant potential even during the 1982 period. In short, Faust possessed skills for

which there was still some need even in the reduced business environment, since his administration and sales correspondent experience permitted him to perform other noninstallation functions in the reduced department. Also, Faust had slightly higher performance ratings than Brieck during the 1978-1981 period, as follows:

	1978	1979	1980	1981
Eugene Brieck	3	2	2	3
Hugh Faust	4	3	3	3

The same factors were the basis for the company's recalling Faust in July, 1983 when Harbison-Walker's business began to improve.

10. Attached hereto as Exhibits G and H respectively are job descriptions for the Product Specialist and Installation Specialist positions. These job descriptions accurately set forth the principal functions and responsibilities of these jobs. The duties of the Product Analyst job are similar to those of a Product Specialist. This classification is generally used for a relatively new employee during the first few years of employment.

/s/ William G. Sekeras
WILLIAM SEKERAS

Sworn to and subscribed before me this 3rd day of July, 1985.

/s/ Teresa A. Warholah
Notary Public

EXHIBIT A

DRESSER'S ANNUAL REPORT 1982

* * *

FINANCIAL HIGHLIGHTS

Dollars in Millions *Except Per Share Data*	1982	1981	% Change
Sales revenues	$4,160.6	4,614.5	−10
Earnings before taxes	$ 242.8	528.6	−54
Net earnings	$ 172.3	316.6	−46
Dividends paid	$ 60.8	51.7	+18
At year-end			
Total invested capital	$2,564.5	2,358.5	+ 9
Shareholders' equity	$2,019.2	1,924.6	+ 5
Total debt	$ 545.3	433.9	+26
Backlog	$1,001.9	1,687.6	−41
Employees	000 45.0	57.0	−21
Per share			
Net earnings	$ 2.19	4.04	−46
Dividends paid	$ 0.77	0.66	+17
Stock price—high	$ 37.75	57.00	−34
low	$ 12.25	30.88	−60

Distribution of the 1982 Sales Dollar—Millions

Materials & supplies	$2,159	52%
Wages & benefits	$1,471	35%
Taxes, Depreciation, Interest, Dividends, Retained Earnings	$531	13%

OPERATIONS REVIEW/Segment Summary

[Data relating to other Dresser divisions omitted in printing.]

Refractories & Minerals

Dollar Amounts in Millions			1982	1981	1980	1979	1978	1977
Segment sales		$	302	439	461	425	344	306
Segment operating profit		$	(20.5)	37.1	53.7	63.7	40.9	43.5
Segment margin		%	(6.8)	8.5	11.7	15.0	11.9	14.2
Sales—quarterly								
First	1/31	$	83	101	112	97	76	73
Second	4/30	$	87	113	124	106	74	77
Third	7/31	$	72	120	107	110	94	79
Fourth	10/31	$	60	105	118	112	100	77
Segment total		$	302	439	461	425	344	306
Sales—geographic								
United States		$	224	327	328	339	285	244
Canada		$	32	48	57	39	33	30
Latin America		$	15	23	20	9	5	7
Europe		$	10	17	28	23	12	13
Mid & Far East, Africa		$	21	24	28	15	9	12
Segment total		$	302	439	461	425	344	306
Sales—product area								
Drilling fluid systems		$						
Petroleum services		$						
Bits, tools & rigs		$						
Dispensing systems		$						
Compressors & pumps		$						
Power systems		$						
Environmental systems		$						
Refractory products		$	279	396	398	358	298	265
Mineral products		$	23	43	63	67	46	41
Const. equipment		$						
Mining equipment		$						
Controls		$						
Tools and abrasives		$						
Industrial equipment		$						
Segment total		$	302	439	461	425	344	306
Sales—product type								
Capital goods		$	2	3	2	4	1	1
Expendable goods		$	300	436	459	421	343	305
Segment total		$	302	439	461	425	344	306
Backlog—quarterly								
First	1/31	$	−6	99	137	118	90	68
Second	4/30	$	63	98	148	133	108	73
Third	7/31	$	58	79	112	134	95	79
Fourth	10/31	$	49	62	93	127	92	79
Capital expenditures		$	16	13	17	29	26	23
Research & engineering		$	9	10	11	10	9	7
Assets		$	221	245	266	256	222	—
Depreciation, etc.		$	14	14	14	16	15	—
Employees		000	3.3	5.3	5.5	7.1	7.0	6.5

* * * *

OPERATIONS REVIEW/
Refractories and minerals segment

Scope of operations

This segment provides technology and specialized refractory products to the high-temperature natural resource industries—the largest of which is steel.

Overview

These basic industries represent the industrial base of the world and have been adversely affected by the global recession as well as by structural changes arising from the significant increase in energy prices, inflation, and reduced demand for basic commodities. In the United States, they have been further penalized by environmental regulations, high-cost labor, obsolete facilities, and intensified international competition.

The weak market conditions were most evident in the domestic steel industry during the past year, as output was the lowest in over two decades and 36 percent below the 1981 level. The industrial sectors of the economy account for about two-thirds of steel consumption in this country, and all sectors have been severely depressed by general economic conditions.

Results

Segment sales declined 31 percent to $302 million in 1982 from $439 million in 1981 and accounted for 7 percent of total Dresser sales, compared to 10 percent in the prior year. Physical volume declined 32 percent.

Internationally, the worldwide recession adversely affected refractory markets. Foreign sales revenues declined 30 percent to $78 million from $112 million in 1981.

The weak product demand resulted in strong competitive pressures in the marketplace that, coupled with

higher costs, resulted in the segment's $20 million operating loss in 1982, compared to an operating profit of $37 million a year earlier.

Research and engineering expenditures of $9 million were down slightly from the 1981 level of $10 million. Most of the spending was related to refractory research at the Garber Research Center of Dresser's Harbison-Walker operations. Research projects were directed toward product and process innovation that leads to value-added results. Dresser's refractory leadership is largely related to the development of solutions to high-temperature process problems rather than to simple product offerings.

U.S. STEEL OUTPUT

Millions of Tons

Years ended 10/31	
1982	80
1981	125
1980	111
1979	139
1978	133
1977	124

Capital expenditures rose to $16 million from $13 million in 1981 and involved programs to increase productivity, reduce costs, and add equipment for the production of new products.

At year-end, employment was off 38 percent to 3,300 from 5,300 at the same year-earlier date and reflected the segment's depressed market environment.

Refractory products—Sales revenues of refractory products amounted to $279 million and accounted for 92 percent of the segment's 1982 sales. Facilities were added to produce tundish boards used in the continuous casting process. Other refractory plants enhanced their capability to produce components for slide gate systems used in some steelmaking processes.

SALES REVENUES

In Millions

1982	$302
1981	$439
1980	$461
1979	$425
1978	$344
1977	$306

Technology and facility improvements provided the means for the segment to maintain its recognized premium quality and strong value analysis programs.

Minerals—The basic functions of the segment's mineral operations are geological exploration, mineral evaluation and development, mining, and mineral processing and marketing. Production from a jointly owned lead mine in Missouri generates most of the operations' revenues.

OPERATING PROFIT

In Millions

1982	($20)
1981	$37
1980	$54
1979	$64
1978	$41
1977	$43

The minerals product area reported a 47 percent decline in sales revenues to $23 million from $43 million in 1981. The lower level of 1982 sales primarily reflected the effect of the recession and reduced lead prices.

Outlook

Market conditions are not expected to show material improvement until major consumers of steel—the construction, automobile, and agricultural industries—begin to recover from the current economic recession. The segment also will benefit from the revival of steel modernization programs that were deferred or slowed during 1982.

However, the domestic steel industry still must deal with the competition of low-cost imports and the negotiation of its labor contract that expires August 1, 1983. If it succeeds in limiting steel imports and achieves a moderate 1983 labor contract without a strike, then the industry and its suppliers can look for improvement in operating levels and profitability as the economy recovers.

1982 SALES BY
MAJOR PRODUCT AREA

Percent of Total

Refractory Products	92%
Mineral Products	8%

Longer term, the technology and skills developed for the refractories industry have applications in other areas. Within the field of industrial ceramics, for example, new products have been developed that provide excellent wear as well as heat resistance.

The segment also has considerable experience in the general field of industrial minerals that will enhance future growth prospects.

* * * *

[Pictures Omitted in Printing]

EXHIBIT B

DRESSER'S
ANNUAL REPORT
1983

* * * *

FINANCIAL HIGHLIGHTS

Dollars in Millions *Except Per Share Data*	1983	1982	% Change
Sales revenues	$3,473.4	4,160.6	−17
Earnings before taxes	$ (81.6)	232.7	
Net earnings	$ 5.1	172.3	−97
Dividends paid	$ 64.1	60.8	+ 5
At year-end			
Total invested capital	$2,526.2	2,564.5	− 1
Shareholders' equity	$1,952.9	2,019.2	− 3
Total debt	$ 573.3	545.3	+ 5
Backlog	$ 896.8	1,001.9	−10
Employees	40,500	45,000	−10
Per share			
Net earnings	$ 0.06	2.19	−97
Dividends paid	$ 0.80	0.77	+ 4
Stock price—high	$ 25.50	37.75	−32
low	$ 15.00	12.25	+22

* * * *

REFRACTORIES AND MINERALS

Profile

This segment supplies heat containment products (refractories) to industries utilizing high-temperature processes. The market is divided approximately 60/40 percent between the steel industry and a variety of other industrial customers. Refractory products are consumed in production processes, and demand is directly proportional to the user's operating rate.

Market conditions

The performance of the country's basic industries—often referred to as the "smokestack" industries—has been adversely affected by the recession, severe foreign competition, and structural problems related to high-cost labor, obsolete facilities, and product substitutions.

Weak market conditions were highly evident in the domestic steel industry, as output in 1982 and 1983 was the lowest in over 20 years or 40 percent below the average for the previous decade.

The industrial side of the economy is in the early stages of market recovery. The demand for refractory products, while stronger than it has been since mid-1982, remains below levels that existed prior to the economic downturn and those needed to generate acceptable profitability for the segment over the longer term.

Domestic steel output is expected to rise by 10 to 15 percent in 1984, reflecting the continued expansion of the industrial sectors of the economy, and this could push steel industry operating rates to more than 70 percent.

Trends such as continuous casting of steel, production of lighter automobiles, and reduced investment by other basic industries will combine with the strong role of low-cost imports to cause further productive capacity reduction in the U.S. steel industry over the balance of the decade. The effect of this trend on the refractory market can be partially offset, however, by capitalizing on the growing potential from modernization programs and technological upgrading within the steel industry as well as future expansion in other industrial markets.

Operating results

Sales revenues were off 11 percent for the year to $269 million and compare with $302 million in 1982. Fourth quarter revenues rose 25 percent from year-earlier levels

primarily because of the improved conditions in the domestic steel industry. The industry produced 20 percent more steel in the last half of Dresser's fiscal 1983 than it did during that period of 1982.

Industrial capacity utilization in the U.S. is at its highest levels in more than two years and, with economic indicators remaining positive, capital goods industries have begun stimulating steel shipments, expanding the need for a variety of refractory products used in various steps of steelmaking. Other high-temperature production processes also are benefiting.

Over three-fourths of the segment's revenues are generated from domestic sales, which amounted to $211 million in 1983 and compare with $224 million from the previous year. Foreign revenues were $45 million, down from $56 million in 1982, and exports totaled $13 million, off from $22 million a year earlier.

Low market activity, competitive pricing, and substantial one-time costs incurred in closing several inefficient plants caused the segment to operate at a loss for the second consecutive year. The fiscal 1983 operating loss totaled $15 million, a reduction of $6 million from the year-earlier operating loss. However, as a result of cost reduction programs, the segment turned profitable in the fourth quarter following six consecutive quarterly losses.

The backlog of unshipped refractory orders amounted to $45 million, down from $56 million three months earlier and $49 million at October 31, 1982.

Refractory products accounted for 93 percent of the segment's 1983 revenues, which declined 10 percent to $250 million from $279 million in 1982. This product area continues to benefit from the trend toward more efficient steelmaking furnaces and continuous casting ad-

vances and is focusing on advanced-technology applications. Late in 1983, for example, the segment divested itself of the DURO brand of refractories that provided acid and abrasion resistance capabilities but had lower profit potential than the newer-generation proprietary products that have made Dresser's Harbison-Walker Division the world's leading supplier of refractories.

Mineral product revenues were off slightly at $19 million from $23 million a year earlier. These revenues constituted 7 percent of the segment total in 1983 and were derived primarily from the segment's joint-venture lead mine.

Internal actions

The segment closed five refractory plants, sold a refractory product line that no longer dovetailed with long-term objectives, and took other decisive internal actions to lower costs and enhance efficiency. However, segment employment, which was reduced by a substantial 38 percent in 1982, held relatively steady during much of 1983 and ended the year at 3,500, up from 3,300 at October 31, 1982.

Capital spending was off slightly to $15 million from $16 million in 1982 and, as in the prior year, was allocated primarily to equipment additions to facilitate efficiency, since market conditions necessitated the down sizing of existing capacity in refractory operations.

This segment continued to adapt its research and development efforts to the competitive transformation domestic steel producers are undergoing. Most of the segment's $5 million in research and engineering spending in 1983 was to maintain technological leadership through the development of new and improved refractory products.

Outlook

Segment sales revenues bottomed in the first fiscal quarter of 1983 and have shown gradual improvement since in response to the domestic steel industry utilizing more of its productive capacity and stepping up modernization programs.

The cost-cutting measures adopted in 1982 and 1983 have substantially lowered break-even points and provide the opportunity for earnings leverage as the economic recovery continues to expand.

[Pictures and Graphs Omitted in Printing]

SUMMARY OF SEGMENT OPERATIONS

Dollars in Millions		1983	1982	1981	1980	1979	1978
Sales analysis							
quarterly							
First ——— 1/31	$	59	83	101	112	97	76
Second —— 4/30	$	63	87	113	124	106	74
Third —— 7/31	$	72	72	120	107	110	94
Fourth — 10/31	$	75	60	105	118	112	100
Total		269	302	439	461	425	344
geographic							
United States	$	211	224	327	328	339	285
Canada	$	29	32	48	57	39	33
Latin America	$	13	15	23	20	9	5
Europe	$	3	10	17	28	23	12
Mid & Far East, Africa	$	13	21	24	28	15	9
Total	$	269	302	439	461	425	344
product area							
Refractory products	$	250	279	396	398	358	298
Mineral products	$	19	23	43	63	67	46
Total	$	269	302	439	461	425	344
product type							
Capital goods	$	1	2	3	2	4	1
Expendable goods	$	268	300	436	459	421	343
Total	$	269	302	439	461	425	344
Operating profit	$	(14.5)	(20.5)	37.1	53.7	63.7	40.9
% of sales	%	(5.4)	(6.8)	8.5	11.7	15.0	11.9
Backlog							
First ——— 1/31	$	51	76	99	137	118	90
Second —— 4/30	$	52	63	98	148	133	108
Third —— 7/31	$	56	58	79	112	134	95
Fourth — 10/31	$	45	49	62	93	127	92
Capital spending	$	15	16	13	17	29	26
Research & eng.	$	5	9	10	11	10	9
Assets	$	210	221	245	266	256	222
Depreciation, etc.	$	12	14	14	14	16	15
Employees	000	3.5	3.3	5.3	5.5	7.1	7.0

* * * *

EXHIBIT C

To:
See Attached List

Date: April 26, 1982

From:
L. G. Sanberg
Pittsburgh Office

Refer:

Subject:
Elective Termination Program

CC: File

As a result of depressed business conditions, Harbison-Walker has announced to all domestic salaried employees who are presently age 60 or over, or who will become age 60 during 1982, an Elective Termination Program.

Highlights of the program are:

1.) Voluntary participation;

2.) Termination date of May 31, 1982; and

3.) Depending upon length of service, either a lump-sum settlement or a modified salary continuation plan.

Samples of the announcement forwarded to eligible employees are attached for your understanding. In the eventuality any eligible employee under your supervision requires clarification of the program, please refer them directly to the Pensions and Insurance Department.

/s/ LGS

LGS/dlh

Attachments

L. G. Sanberg
Vice President—Industrial Relations

Telephone 412-567-6318

April 23, 1982

LETTER TO EMPLOYEES WITH TEN (10) OR MORE YEARS OF SERVICE

Dear

As you are aware, Fiscal 1981 was not a good year for Harbison-Walker Refractories and Fiscal 1982 could be even worse. With the production of steel, glass, cement, aluminum and copper steadily plummeting, we are experiencing extremely depressed business conditions. In response to these conditions, we have implemented select salaried personnel reductions in attempting to control capacity costs.

As part of this continuing effort, an Elective Termination Program is being offered to all domestic salaried employees that are presently age 60 or over, or who will become age 60 during 1982. Participation in this program is *totally voluntary* on your part, and provides two alternatives for your consideration.

Under the first option, the program would pay a lump-sum amount on the termination date of May 31, 1982, equal to one week's salary for every full year of service, up to a maximum of 26 weeks. This means that you would receive based on your years of service and your current salary.

Under the second option, the program would provide you, for a period of two years after your termination, monthly payments equal to 25% of your current monthly salary. This means that you would receive per month for two years beginning June 1, 1982.

As you know, if you decide to participate in this special program and terminate on the date provided in the

program, you may request immediate payment of reduced pension benefits or wait until age 65 for normal deferred benefits under the plan. Either way, your pension benefit will be based on your years of pension service accrued to May 31, 1982 and pension plan provisions. You will also receive 1982 vacation pay of approximately for weeks of vacation plus pro-rata vacation pay if you retire. Of course, pay for any vacation time already taken will be deducted from the regular vacation pay.

Your decision whether to participate in this special program is a very personal matter requiring your careful consideration of a multitude of factors. Again, I would like to stress that your election is totally voluntary.

The above represents the special features of the program. Other post-employment benefits such as group health insurance and life insurance would be available according to the normal plan provisions applicable to you.

If you elect this program, your effective termination date will be May 31, 1982. If you have an interest in the program, please advise R. R. Leasure on or before May 14, 1982, in order that we can review in detail your pension calculations and options.

Very truly yours,

/s/ L. G. Sanberg

LGS/dlh

Enclosure

cc: R. R. Leasure

EXHIBIT D

IRON AND STEEL MARKETING SUPPORT GROUP
(EXCLUDING SECRETARIES) JUNE 1982

Name	Title	Age As Of June 1, 1982	Seniority Date
L.L. Sheatsley	General Products Mgr.	46	7/61
C.D. Jamison	Applications Engineer	55	5/59
C.F. Wenrich	Mgr.-Special products	54	6/48
R.J. Murray	Product Mgr.	39	10/68
S.R. Pavlica	Product Mgr.	43	4/63
R.L. Hart	Product Mgr.	44	10/73
T.W. Lewis	Group Products Mgr.	42	8/64
D.E. Moniot	Product Mgr.	39	6/65
R.C. Wyda	Sr. Products Specialist	50	2/58
E.F. Brieck	Installation Specialist	55	6/65
A.G. Malarich	Installation Specialist	59	8/66
H.J. Faust	Installation Specialist	39	9/66
W.L. Meixell	Installation Specialist	59	1/80
C.L. Maus	Product Analyst	26	6/78
D.N. Heath	Sales Correspondent	33	9/70
H.A. Marsh	Sr. Products Specialist	57	3/76
D.R. Westphal	Product Analyst	22	8/81
M.K. Clark (Hammersly)	Product Analyst	24	6/79
J. Bortner	Product Analyst	26	8/79
D.H. Wright	Product Analyst	24	8/81
R.C. Kaldon	Product Mgr.	33	8/74
M.J. Ducato	Product Analyst	24	4/81
G.E. Shortman	Product Analyst	26	8/81
K.D. Regan	Product Analyst	22	6/81
D.L. Smith	Product Specialist	33	6/70
D.D. Huminsky	Product Specialist	48	1/74
B.L. Bailey	Product Analyst	22	6/81
R.L. Ihrig**	Product Analyst	23	6/80
A.G. Dean	Product Specialist	52	3/79
J.K. Miller	Sr. ProductSpecialist	54	12/60
P.H. Conley	Product Analyst	27	4/80
J.J. Schwerer	Product Analyst	24	6/80
G.C. Dodds	Product Analyst	23	6/81

**Resigned 7/9/82

Total Number of Employees, Excluding Ihrig 32

Average Age 38.25

Total Number of Employees Age 40 or Older 14 (43.75%)

EXHIBIT E

IRON AND STEEL MARKETING GROUP
AS OF DECEMBER 1, 1982

Name	Title	Age As Of June 1, 1982	Seniority Date
L.L. Sheatsley	General Products Mgr.	46	7/61
C.D. Jamison	Applications Engineer	55	5/59
C.F. Wenrich	Mgr.-Special Products	54	6/48
R.J. Murray	Product Mgr.	39	10/68
S.R. Pavlica	Product Mgr.	43	4/63
R.L. Hart	Product Mgr.	44	10/73
T.W. Lewis	Group Products Mgr.	42	8/64
D.E. Moniot	Product Mgr.	39	6/65
R.C. Wyda	Sr. Products Specialist	50	2/58
H.A. Marsh	Sr. Products Specialist	57	3/76
M.K. Clark (Hammersly)	Product Analyst	24	6/79
J. Bortner	Product Analyst	26	8/79
R.C. Kaldon	Product Mgr.	33	8/74
M.J. Ducato	Product Analyst	24	4/81
K.D. Regan	Product Analyst	22	6/81
D.D. Huminsky	Product Specialist	48	1/74
B.L. Bailey	Product Analyst	22	6/81
A.G. Dean	Product Specialist	52	3/79
J.K. Miller	Sr. Product Specialist	54	12/60
P.H. Conley	Product Analyst	27	4/80
W.N. Porter	Sr. Products Specialist	31	6/75

Total Number Employees 21

Average Age 39.61

Average Age (Including Ages of Faust, Westphal and Shortman, Who Were Eventually Recalled) 38.29

Total Number Employees Age 40 or Older ..... 11(52.3%)

EXHIBIT F

EMPLOYEES LAID OFF FROM IRON AND
STEEL MARKETING GROUP—JULY-NOVEMBER, 1982

Name	Title	Age As Of 6/82	Seniority Date	Date Of Layoff
E.F. Brieck	Installation Specialist	55	6/65	7/2/82
W.E. Meixell	Installation Specialist	59	1/80	7/9/82
C.L. Maus	Product Analyst	26	6/78	7/9/82
G.C. Dodds	Product Analyst	23	6/81	7/9/82
J.J. Schwerer	Product Analyst	24	6/80	7/9/82
D.L. Smith	Product Specialist	33	6/70	7/13/82
A.G. Malarich	Installation Specialist	59	8/66	7/30/82
D.N. Heath	Sales Correspondent	33	9/70	8/2/82
D.H. Wright	Product Analyst	24	8/81	11/12/82
G.E. Shortman	Product Analyst	26	8/81	11/12/82
D.R. Westphal	Product Analyst	22	8/81	11/18/82
H.J. Faust	Installation Specialist	39	9/66	11/18/82

Average Age 35.25

Average Age (Excluding Faust, Shortman and Westphal) 37.33

Total Employees Laid Off Who Were Age 40 or Older ... 3 (25%)

EXHIBIT G

IRON & STEEL MARKET

Title: Products Specialists

Reports To: Products Manager

Objectives:

To develop the marketing concept in the specific application areas assigned by the Products Manager. To aid in developing plans for product improvement and to make recommendations for profit improvement.

Functions:

1. To be technically competent in the specific applications assigned to him and be thoroughly familiar with all products that can be used in this application area.
2. Work closely with field sales representatives to keep them familiar with the changing technology in these application areas.
3. Make sales calls with the Field Sales Representative where the potential justifies it to promote ideas and acquaint customers with the technical capabilities of Harbison-Walker.
4. Make field calls with the sales representatives to investigate complaints and also to develop detailed service experience in his particular application area.
5. Through his Products Manager and General Products Manager work with the Product Development Department to keep them informed regarding the changing technology and needs in his specific application area.

6. Work with the Product Development Department as necessary in the development, introduction and promotion of new products in his assigned application area.
7. To work closely with the Applications Engineer in the development of new refractory concepts for his specific application area.
8. To constantly be alert for products and applications that lend themselves to joint marketing efforts, increased volume and greater profitability.
9. Prepare reports as directed.
10. Be fully informed on competitors products used to his application area.
11. Will conform to Division practices and procedures.

EXHIBIT H

Location: Iron and Steel

JOB DESCRIPTION

Exempt

Position Title: Installation Specialist

Reports to: Products Manager

Objective: Aids Iron and Steel customers in proper installation of products to provide maximum customer satisfaction and maintains complete feedback of expert observation of refractory application.

Primary Responsibilities:

1. Provides expert help to construction, maintenance and operating personnel of customers to aid them in the proper use of our products in Iron and Steel Market.
2. Develops improved, original and imaginative concepts of installation practices to better meet customer requirements.
3. Reports and analyzes value of new customer processes, practices and refractory uses.
4. Reports details about the Company and competitive products observed in customer plant.
5. Evaluates Company products observed identifying needed improvements to meet the market conditions.
6. Reports installation progress to Field Sales Representative during the time spent in his customer's plant.
7. Prepares reports, analyses and plans as required by his Products Manager.
8. Conforms to Company policies and procedures.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

AND NOW, this 29th day of July, 1985, come Plaintiffs by and through their undersigned counsel, and file their Opposition to Defendant's Motion for Summary Judgment, as follows:

STANDARD FOR GRANT OF MOTION FOR SU MARY JUDGMENT

In the instant action, this court should deny Defendant's Motion for Summary Judgment, because it is an extreme remedy and would deprive Plaintiffs of their right to a jury trial. As stated by the court in *Douglas vs. Anderson*, 656 F.2d. 528 (Ninth Circuit, 1981), "We recognize that summary procedures should be used judiciously, particularly in cases involving issues of motivation or intent." *Id.*, et 535. In the first, third and fourth causes of action set forth in Plaintiff's Complaint, the intent or motivation of Defendant is an element of Plaintiff's proof, and this court should deny Defendant's Motion for Summary Judgment because there is an issue of material fact regarding Defendant's motivation or intent.

As stated in numerous cases, "All doubts are to be resolved and inferences drawn in favor of the nonmoving party." *Continental Insurance Company vs. Bodie*, 682 F.2d. 436, 438-39 (Third Circuit., 1982) and *Hollinger vs. Wagner Mining Equipment Company*, 667

F.2d. 402, 405 (Third Circuit., 1981). Numerous other cases stand for the same proposition. For example in *Yuba Goldfields, Inc. vs. United States*, 723 F.2d. 884 (Federal Circuit., 1983), the court stated the following: "Because the Summary Judgment remedy can be harsh in its finality, its application must be accompanied by great care in respect of the entire record and the relevant law." Also, in *D.L. Auld Company vs. Chromer Graphics Corporation*, 714 F.2d. 1144 (Federal Circuit, 1983), the court stated the following:

> "Summary Judgment is an important means of conserving judicial and other resources, but it must be carefully employed in appropriate cases for an improvident grant may deny a party a chance to prove a worthy case and an improvident denial may force upon a party and the court an unnecessary trial."

ARGUMENT

In a case cited by Defendant, *McCorstin vs. United States Steel Corporation*, 621 F.2d. 749 (Fifth Circuit., 1980), the Appellate Court reversed and remanded a district court decision against an employee, reversing the district court's grant of summary judgment in favor of the employer. In circumstances even more in favor of the employer than in the instant case, the court in *McCorstin* stated that the grant of summary judgment "was clearly in error because the factual reason for [the employee's] discharge was hotly contested and genuinely in dispute." *Id.*, et 751 footnote four. The Appellate Court was aware that the employee had a very "checkered" employment history with the employer, and had even been demoted on several occasions, the employee had received performance evaluations which in the words of the court were "increasingly deteriorating" in nature, and the employee had very limited experience in a particular department, which would have reduced the desirability of his being moved to another job in that department,

the employee was not replaced by someone less than age 40, and there was some evidence that the employee had been fired for cause rather than having been subjected to a reduction in force. Even under all of such circumstances, the Appellate Court ruled that the district court had erred in granting the employer's Motion for Summary Judgment regarding the employee's age discrimination claim.

Unlike the employee in *McCorstin*, Eugene Brieck, the Plaintiff in the instant action, had a very good employment history with Defendant, even according to Defendant's own witnesses. Plaintiff testified in his deposition that he had not been reprimanded, suspended, nor had a pay raise "held back", had never been disciplined, and never had so much as a "bawling out behind closed doors" during the entire seventeen years of his employment with Defendant (Brieck deposition page 60). Moreover, Plaintiff had been sent out on international assignments "dozens" of times, and Plaintiff testified that none of the other installation specialists had been given such tasks; such tasks involved great responsibility, and yet Plaintiff testified that he was the only one of the installation specialists who was entrusted with such assignments (Brieck deposition page 57). Moreover, contrary to various allegations appearing in Defendant's Memorandum in Support of Motion for Summary Judgment, Plaintiff had the longest continuous length of service with Harbison-Walker, of all the installation specialists, and he had very substantial experience in blast furnace cast houses and with all kinds of installation specialist activities. In the words of Plaintiff, "Most people would specialize in a particular furnace, I hit them all", (Brieck deposition page 10), and he performed all of the functions of the installation specialist. (Brieck deposition pages 10-11, 14-15, 21, 42-43). Moreover, Plaintiffs had received in the period of time shortly before his layoff, four different indications from Defendant that he would not be laid off in the near future, as follows:

1. In August of 1980, Larry Sheatsley, one of Plaintiff's superiors, in the presence of Donald Jamison, Plaintiff's immediate supervisor, indicated to Plaintiff that he did not have to worry about being laid off (Brieck deposition, pages 45-48);

2. In February, 1982, Sheatsley informed Plaintiff, in response to a direct question from Plaintiff ("What's the chance of me getting laid off?") Mr. Sheatsley said to Plaintiff, "You won't have nothing to worry about." (Brieck deposition, pages 34-35, 45);

3. In the spring of 1982, Plaintiff received the Spring, 1982, edition of the Dresser Industries company newsletter adressed to its employees, which contained a front-page article which was a verbatim record of an interview with Ralph Ytterberg, Senior Vice-President Human Resources of Dresser Industries, in which Mr. Ytterberg said in response to the question, "How do you determine who gets laid off?", the following:

> . . . [L]ayoffs are implemented only after an extensive review of alternatives. Obviously, layoffs, when they are necessary, occur in departments or operating units most affected by the business decline. Length of company service and skill requirements necessary to carry out the reduced business activities are the most important considerations. We try to do what is right and fair. . . ." (Paragraph 15 of Plaintiff's Complaint, and Nicolella deposition exhibit #2).

Plaintiff relied upon this statement from such a high-ranking person in the overall personnel administration hierarchy of the company (Brieck deposition page 38); as even Defendant's own documents indicate, Plaintiff had more continuous plant service than any of the other installation specialists (Defendant's Pretrial Statement, pages 3-4; document submitted to the Pennsylvania Human Relations Commission by Defendant), and he felt that he was the most qualified of the four installation specialists, and such belief was supported by the good employment history of Plaintiff with Defendant, his having received laudatory comments from customers and other employees regarding his work performance (Brieck affidavit; Sheatsley deposition, pages 6-8; 10-12, 15, 54), and other matters set forth herein.

4. By note dated March 24, 1982, Donald Jamison, the immediate supervisor of Plaintiff, informed Plaintiff of a merit raise that he was granted, effective retroactive to March 1, 1982, and in such note indicated that "The merit raise is well deserved and we hope that we can continue to reward you for your good work." Later in the same note, Jamison acknowledged that Plaintiff was being sent on an international assignment to Turkey, and he closed the note by saying, "Again, thanks for your fine efforts."

When Defendant made the decision to keep Hugh Faust and Al Malarich for retention and not for lay-off in the first lay-off announced July 2, 1982, Faust was under age 40 and Malarich was in the protected age group. Malarich was then laid off shortly thereafter, on July 30, 1982, thus leaving Faust, the only one of the four installation specialists under age 40, as the only installation specialist retained. (Defendant's Pretrial Statement, pages 3-5) Plaintiff testified that Faust was not experienced as an installation specialist, that Faust had been "mostly an office boy", one who performed odd jobs around the office, one who handled the office's rental cars, who did "nothing technical", and that "he was more like a gopher . . . [He was] the odd man out . . . If there was an installation, he didn't have nothing to do, he would go out and sub for them. He never went on a

job, to my knowledge, by himself. He was always with somebody . . . He had no training in this particular type of field." (Brieck deposition, pages 31-32). Mr. Brieck also testified that although Faust helped in the quotation of prices, he could not make drawings, sketches or develop specifications, which Brieck could. (Brieck deposition, pages 32-33)

Faust testified that when he first came to work with Defendant in September, 1966, he held the position of assistant correspondent, continued in that position for four years, then became correspondent and he held that position for the next five or six years; then, in approximately 1975 or 1976, he became staff correspondent, a position he held for approximately three years, and only when he became a staff correspondent did he first have any experience with the duties of an installation specialist, and then he went out on installations only on approximately two or three days a month, or in Faust's words, his work on installations "wasn't very often," "it was a very small percentage" of his total time spent as an employee of Defendant. (Faust deposition, pages 9-15) Faust could not testify as to when he first acquired the position of installation specialist, but one must assume that it was not before 1978 or 1979. Faust testified that after he became an installation specialist, even then he did not go out on the road and do installations as frequently as the other installation specialists, about fifty per cent of his work days being spent on installations, and about fifty per cent being spent in the office; included in the office work he would do would be "margins" and "gofer" work, a role which Faust frankly testified was his, when he testified as follows:

> Q. Any other kind of office work you did as an installation specialist?
>
> A. I can't think of anything offhand. I usually do a lot of things that people just tell me to do. Like a car needs fixed, got something out at advertising that we need. Whatever. Even drove a forklift down the warehouse one time.
>
> Q. So if somebody had to go for something, you might have to do that?
>
> A. Not have to, I would be asked nicely to do it. I would volunteer.
>
> Q. Excuse me for degrading your role, but would part of you [sic] job be to be a gofer?
>
> A. Sure. I don't mind doing that. It's something different.
>
> Q. I'm not saying anything bad about it, but part of your job was to be the office handyman?
>
> A. Yeah. That was part of being staff correspondent. I like doing things for people. The department as a whole. It makes things go easier. Everydepartment needs one. (Faust deposition, pages 21-22)

Defendant's story about Faust's superior qualifications seems doubtful at best when seen in light of the above very frank remarks of Mr. Faust. At best, he had been an installation specialist only since approximately 1978 or 1979, when Brieck had been an installation specialist continuously from his initial date of employment with Defendant, in June, 1965. Moreover, Mr. Brieck testified that he had had prior experience in bricklaying, masonry, and specifically in industrial bricklaying, prior to coming to work with Defendant in June, 1965. (Brieck deposition, pages 7-10) Furthermore, in his June 17, 1982, memorandum purporting to justify the furlough of Plaintiff and three other employees with over 15 years service with Defendant, John M. Nicolella, Manager of Personnel of Defendant, stated that Brieck and Faust had exactly the same ratings in 1981 and 1982, "FS", which apparently stood for "fair to satisfactory" (Nicolella deposition exhibit #5, page two). It is inconsistent for Nicolella to say that Mr. Brieck was the "least qualified" of the four installation specialists, and in the same memo-

randum, which indicates that Plaintiff had more continuous service than Faust, say that the ratings of Faust and Brieck were the same in 1981 and 1982.

Faust testified that he was laid off in November, 1982, and was called back effective August, 1983, as a full-time employee, and that since that time he was spending approximately 75 per cent of his working time on the road, doing installations, thus leaving him only approximately 25 per cent of his time for the apparently, if Defendant's story is to be believed, all-important office work. With regard to the type of office work which Faust has performed since his recall in August, 1983, he testified that he did reports of his installations, did "margins", apparently did "some filing", and "also some gofer work like getting drawings out to the works, to salesmen." (Faust deposition, pages 30-31) Faust admitted that any installation specialist would have to prepare reports regarding the installations, as any installation specialist would do, and Mr. Brieck testified that he also had prepared installation reports when he was in the office. (Faust deposition, page 31; Brieck deposition, pages 19, 23, 24)

As stated by the court in *Bernstein v. Consolidated Foods Corporation*, 36 FEP Cases 1333 (N.D. Ill., 2/18/84), in denying the defendant-employer's motion for summary judgment, the moving party has the burden of showing that there is no genuine issue of material fact. *Id.*, at 1337 note 2, citing *Korf v. Ball State University*, 726 F.2d 1222 (7th Cir., 1984). Defendant has not met its burden of showing that there is no genuine issue of material fact. The decision to retain Faust, the only one of the four installation specialists under the age of 40, is highly suspect. Moreover, Faust is the only one of the four installation specialists who was recalled as a permanent employee and who is still employed as an employee of Defendant. Larry Sheatsley testified that no consideration was given to recalling or rehiring Mr.

Brieck rather than Faust in the middle part of 1983. (Sheatsley deposition, page 38)

In the case of *Miles v. M.N.C. Corporation*, 36 FEP Cases 1289 (11th Cir., 1/15/85), the court of appeals held that an employer's subjective evaluation of the quality of a black laid-off employee's work performance as compared to that of a white laid-off employee cannot, without more, be a legitimate basis for its decision to recall the white laid-off employee but not the black laid-off employee. As can be seen by the supporting materials that will accompany Plaintiffs' Supplemental Opposition to Defendant's Motion for Summary Judgment, the evaluation system utilized by Defendant was subjective in the extreme, and also such system had no means to evaluate each employee's performance objectively. The evaluation system utilized by Defendant was totally non-professional, and should be entitled to little or no weight.

CONCLUSION

For the above reasons, and for the reasons to be supplied to the Court no later than August 1, 1985, in Plaintiffs' Supplemental Opposition to Defendant's Motion for Summary Judgment, Plaintiffs respectfully request that Defendant's Motion for Summary Judgment be denied, and that this case be set down for pretrial in the very near future.

/s/ James H. Logan
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[Certificate of Service Omitted in Printing]

DRESSER NEWS ARTICLE

DRESSER NEWS

An Equal Opportunity Employer M/F

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Spring 1982

Business at Dresser plants varies widely . . .

Some plants forced to make employee layoffs

Like many large and diversified companies, Dresser's business performance oftentimes varies widely from one operating unit to another. These performance differences not only affect the profitability of the company as a whole, but play a significant role in the operations of individual divisions and plants. 1981 was a poor year for some Dresser facilities, with serious sales and profit losses making it impossible to maintain regular operations. Because of Dresser's diversification of products and markets, however, the overall future is positive for continued growth.

In this interview, Ralph Ytterberg, Senior Vice President—Human Resources, discusses the problem of employee layoffs at several Dresser locations, how layoff decisions are made, and the current business outlook.

Q. We frequently read in the business and financial pages that Dresser Industries' sales and profits continue at favorable levels, yet we have a substantial number of employees on layoff at many of our operating units. Why is this occurring?

A. Dresser is a highly diversified company. We are involved in over 100 different markets. Sales and earnings of some operating units, particularly those serving the oil and gas industry, are holding up very well. However, business in a few of our other operating units has dropped off substantially. Some are operating at a loss.

Basically, our national economy has slowed to the point that many of our customers just are not buying new equipment. And that means that some plants and divisions simply do not have enough work to support the number of employees they have had when business was good.

Q. How severe is the layoff problem?

A. It varies among the operating units. For a few it is very serious with more than 50 percent of the work force on layoff. For others, the layoffs are relatively minor. A number of operations have had no layoffs, of course.

Q. Have most of the layoffs affected only hourly workers?

A. Not at all. Our employment cutbacks have included both hourly and salaried employees at all levels.

Q. How do you determine who gets laid off?

A. I can assure you, we don't take layoffs lightly. They are very serious decisions, and we realize the seriousness of the impact on each household they affect. In fact, layoffs are implemented only after an extensive review of alternatives. Obviously, layoffs, when they are necessary, occur in departments or operating units most affected by the business decline. Length of company service and skill requirements necessary to carry out the reduced business activities are the most important considerations. We try to do what is right and fair. Layoffs are never made unless they are absolutely necessary. We recognize, though, that no one can cheerfully accept the loss of his or her job, regardless of how logical the decision is. It's a very serious problem for everyone and we do and must deal with layoffs accordingly.

Q. What steps exactly do you go through in considering a layoff, particularly when it is a group of management, administrative or professional employees?

A. The first step, of course, is to take a good reading of the near and long-term prospects for that particular operation. Is the downturn likely to be a short one, or

can we logically expect it to continue for months or even indefinitely? From there, our Group and Division managers begin to determine the number and types of jobs needed to operate at reduced levels.

The toughest part is next, of course, because it involves identifying individuals whose skills are most essential to the continuation of the business. As I said earlier, an important consideration is the number of years an employee has served the company and performance levels. Needless to say, we also look at every layoff plan to make sure that its impact does not unfairly affect any group of employees.

Salaried layoff plans, as developed by the Group and Division managers, are then discussed with corporate officials here in Dallas. Frankly, we devote a substantial amount of time to this review. We discuss not only why the layoff is contemplated, the business outlook and so forth, but exactly what is proposed, person by person.

Q. Don't large layoffs affect employee morale, even for the ones who remain at work?

A. Absolutely! Large layoffs are bound to have an adverse effect on employee morale. It is only human to speculate about who will be next and whether you and your friends and co-workers will be among them. But generally speaking, most employees are demonstrating a realistic understanding of the situation and are cooperative in making the necessary adjustments that layoffs create. When business drops off, it becomes extremely important for each of us to do the best job possible to keep our operation competitive in the marketplace.

Q. When do you think the business upturn will get under way?

A. Many business and government economists are forecasting that the turn-around will occur yet this year. President Reagan and the conservatives in Congress have initiated some of the boldest moves of any administration in the past 40 years. The biggest tax cut in history was passed. The rate of inflation has been dropping steadily.

Interest rates, while still high, have dropped below the 20.2 percent rate that this administration inherited. You should remember that during President Carter's term of office, the prime interest rate rose from 6.3 percent to 20.2 percent, the rate of inflation rose from 5.8 percent to 13.5 percent, and the federal budget increased by 132.6 percent. We are now paying for the excesses of those and previous years of mammoth government spending. I believe we are on the right track now to economic recovery, but it is a slow, painful process that affects many Dresser people.

Q. What industries will recover first, as you see it?

A. That's difficult to say, but the ripple effect will come into play on the upturn just as it did on the downturn. When autos start selling, the steel and metalworking industries will pick up and this will stimulate business in our operating units serving those industries. Construction and roadbuilding and repair programs have been curtailed substantially. These involve projects that must be undertaken at some point in time, and they will add momentum to the upturn.

Q. Do you feel that the recession has bottomed out?

A. Yes, I do, and I believe that over the next several months we will see many Dresser operating units which have been hurt by the recession begin their recovery toward more normal operations.

Q. What does that mean to employees who are on layoff?

A. That slowly, but certainly, the prospects of returning to work become better and better. You know, one of our most important operating goals is to provide continuity of employment for each and every employee who contributes to the success of the company.

Q. Any final comments about employees on layoff?

A. Certainly. I want employees on layoff, and their families, to know that we recognize just how serious their situation is or may become. We are more than sympathetic. We are working as hard as we can to get business back to the point that their jobs are restored.

INSTALLATION SPECIALISTS
IRON & STEEL MARKET

Name	Hire Date	Date of Birth	Date of Layoff
E. F. Brieck	6/7/65	2/8/27	7/2/82
A. G. Malarich	8/1/66	3/31/23	7/30/82
H. J. Faust	9/1/66	5/31/43	—
W. E. Meixell	1/28/80	7/28/23	7/9/82

INDUSTRIAL MARKET

Name	Hire Date	Date of Birth	Date of Layoff
H. Harbacho	3/21/63	6/22/25	—
R. J. Crivelli	7/7/76	12/25/28	—

AFFIDAVIT OF EUGENE F. BRIECK IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

BEFORE ME, the undersigned authority, personally appeared EUGENE F. BRIECK, who, being duly sworn according to law, deposes and says that the facts set forth below are true and correct to the best of his knowledge, information and belief:

1. The allegations of my Complaint are true and correct, to the best of my knowledge, information and belief, and are incorporated herein by reference, except with regard to the allegations of my Complaint concerning the nature of my layoff; I was informed that the layoff would be temporary, but that if I were not called back in nine months that I was to assume that the layoff was changed from being temporary to being permanent.

2. I was the only one of the four installation specialists in the Iron and Steel Marketing Group who had been sent out on international installation assignments. I was regularly sent out on international assignments, and as the sole representative of Harbison-Walker who was present at such installations, I had been entrusted by my employer with a great deal of responsibility and authority, which the employer obviously did not see fit to entrust to the other three installation specialists.

3. As of June and July, 1982, I was the most qualified of the four installation specialists to do installation specialist work, based on my substantial experience in industrial bricklaying before coming to work with Harbison-Walker, my substantial experience with Harbison-Walker, based upon laudatory comments I regularly received from co-employees and from customers, and further based upon my personal observations of the work performance of Al Malarich and Hugh Faust; for ex-

ample, Al Malarich regularly and over a period of years asked me how to perform certain of his duties, which he should have known how to do if he were qualified. Contrary to the statement made by Larry Sheatsley in his deposition that Malarich was "more versatile" and had a "broader experience base" than me (Defendant's Memorandum, page 6), just the opposite is true: I was more versatile than he was, and I had a broader experience base than he had.

4. Contrary to the statement made by Larry Sheatsley that Hugh Faust "was capable of multi-function skills which would have made him more valuable in terms of versatility and ability to perform various functions in the reduced department" (Defendant's Memorandum, page 6), just the opposite was true: Hugh Faust was a "gofer", with limited installation specialist skills, limited technical skills, and limited other skills.

5. I had substantial experience both with Harbison-Walker and with other employers prior to coming with Harbison-Walker, in doing paperwork and miscellaneous office chores; for example, while employed by Harbison-Walker, I did paperwork which consisted of installation reports, making surveys such as the survey on electric furnaces which I had been doing just prior to the July 2, 1982, layoff, making sketches and drawings, etc. Prior to coming to work with Harbison-Walker, I worked with Phoenix Mutual Life Insurance Company, National Life Insurance Company, Sears & Roebuck, and Ero & Bellas (re-upholsterers); while with the insurance companies, I had to be able to read, understand, use and explain a multitude of forms, insurance policies and contracts, and the like; while with Sears and Roebuck, and with Ero and Bellas, my job duties included the pricing and estimating of home improvements and upholstery repairs, and customer satisfaction. While with Harbison-Walker, I had some knowledge of the pricing, bidding and quotation practices of my employer, and to the extent that my knowledge of these practices was less than Hugh

Faust's, I could easily and quickly have been trained to do all the things he had to do with regard to prices, bids and quotations, things such as asking people for information, looking information up in books and catalogs, and dictating letters and the like.

6. At the time of my layoff from Harbison-Walker, I was most willing to do work for Harbison-Walker other than merely installation work, and I was able to perform a number of functions, and could easily and quickly have been trained to perform other functions; I would have been willing to do the "gofer" and other office chores assigned to Hugh Faust, but I was never given the opportunity to do such chores.

7. Had I not been laid off permanently by Harbison-Walker, i.e., if I had been laid off and then recalled like Hugh Faust, and if I were to have continued to work with Harbison-Walker until the normal retirement age of 65, I would have received much greater retirement benefits upon reaching age 65 than I am receiving today and will be receiving in the future; today, I receive only $142.96 per month, which figure is fixed and will not increase, and my age is 58; however, if I had not been laid off by Harbison-Walker, based upon increasing contributions to my retirement plan, and based upon the formula used by my employer, and based upon cost-of-living increases and merit increases that I would have received if I had continued to work with Harbison-Walker, I estimate that I would have received approximately $700.00 per month in retirement benefits from Harbison-Walker upon attaining age 65. My Social Security benefits also will be reduced considerably because of my layoff from Harbison-Walker and my not receiving my ordinary salary until age 65. Also, by being laid off permanently and not being recalled like Hugh Faust, I lost medical benefits which would have continued beyond age 65, life insurance, and dental insurance, as well as the loss of pay. I had a history of cancer, of which I have had no recurrence since 1970, but am un-

able presently to afford health insurance; this means that if cancer were to flare up again, I would not have the money to afford any medical treatment or hospitalization on my own, I would have no insurance, and I would have to rely on welfare to receive medical treatment. Also, whenever I die, I have only $10,000.00 in life insurance death benefits to leave to my wife; if I had not been laid off, death benefits would have been in the amount of at least $55,000.00.

8. Just prior to the July 2, 1982, layoff, I had talked with L. Edward F. Kelly, a financial advisor with Phoenix Mutual Life Insurance Company, regarding the possibility of my investing $600-800 per month toward the retirement of Dolores J. Brieck and me, and we had made tentative plans to invest such sum of money, but after I was laid off we were unable to make such investments, and we presently have no retirement available except for the $142.96 per month which I receive from Harbison-Walker.

9. During my employment with Harbison-Walker, I never received any verbal or written notification of any rating on a performance evaluation, no one ever reviewed with me any performance evaluation, and I doubt very deeply that the performance evaluation of "fair" or "satisfactory" allegedly given to me were in fact given to me at the times indicated, and I allege that the "fair" evaluations were not in keeping with what I was told and was led to believe about the quality of my work performance, which was at least satisfactory.

/s/ Eugene F. Brieck
EUGENE F. BRIECK

Sworn to and subscribed before me this 2nd day of Aug., 1985.

/s/ Henry T. Miklas
Notary Public

EXCERPTS FROM THE DEPOSITION OF EUGENE F. BRIECK

(Record 113a-179a)

* * * *

[5] Q Now, could you tell me how old you are currently, Mr. Brieck?

A 57. Birth date is 2-8-27.

[6] Q Could you very briefly trace your educational background for me starting with where you went to high school?

A McKeesport Vocational High School till [sic] the 16th of March of '45, at which point I went to the service, went to boot camp. After boot camp, ended up in a hospital corp school, Bainbridge, Maryland.

Finished the tour of duty roughly the 20 of October of '46; spent a little bit of time with Bell Telephone, and, let me see, around July, I guess, a year, about 16 or 18 months—no, it was about 18 months later I left Bell and went to U.S. Steel, at which point I went to their medical school—I mean their masonry school to become a bricklayer.

Then the rest of the school was the school of hard knocks.

Q Were you—well, let's go back. The vo-tech school, did you receive a high school diploma from that?

A Yes. Yes.

Q Okay. And have you had any formal education other than your graduation from the vo-tech school? And by formal, I mean as apposed [sic] to the masonry school.

A Hospital corp school, and just tour.

[7] Q So you never attended junior college—

A No.

Q —or college?

A No.

Q Have you ever taken any engineering courses?

A No.

Q How about drafting courses?

* * * *

A No, I haven't had any.

Q Any engineering or drafting courses?

A No. No.

Q Even in McKeesport vo-tech program, they didn't have any industrial arts, drafting courses?

A They had drafting there. I took up radio. Radio repair.

Q Now, with respect to the masonry school, was that part of an apprentice program at U.S. Steel?

A Right. Theory and actual working conditions.

Q Did you attain your journeyman's card?

A Right.

Q When did you obtain your journeyman's card, I [8] take it as a bricklayer?

A Right. We had a little discussion about that a couple weeks ago, and my best guess is that around '51 —latter part of '52, rather. Latter part of '52.

Q You still keep your card—your card is still current?

A No, I don't carry a union card, no. I haven't done that in 20 years.

Q Okay. How long were you employed by U.S. Steel?

A That's what we were discussing. About four and a half years, I guess. Maybe five.

Q So that would have been roughly from, let's see, if you came out of the service in '46—

A From '48 to approximately '52.

Q Okay.

A Don't quote me on that year, but it's in that range.

* * * *

[9] Q Okay. What was the reason for leaving your employment with U.S. Steel?

A There was quite a few layoffs at the time. I had very little seniority, and I had a pretty good size contract to be a selfemployed [sic] contractor.

Q Okay.

A Which I did for about three years.

Q Did you work at any particular plant of U.S. Steel at that point, or—

A I was working out of National Tube, that's where I had originally taken my—that's in McKeesport.

A Then after that I went into the AF of L Masonry Union, and did little bit of industrial bricklaying, coke ovens and blast furnaces.

Q Was this the three years of self employment that [10] you described, or was this after?

A Well, that was sort of merged in there a little bit. It was more after than during.

Q Okay. What was the nature of the self employment, was that bricklaying, contracting?

A Bricklaying, contracting homes and buildings, drive-in theaters.

Q Okay. How long did you work as a masonry journeyman working on industrial bricklaying projects?

A I'd say a good solid six years or so. Very diversified type of training that I had. Most people would specialize in a particular furnace, I hit them all.

Q You referred to working on furnaces. I take it that that would have been pretty much restricted to the steel industry?

A Strictly.

Q Strictly steel industry?

A Uh-huh.

Q Are there any idiosyncrasies in bricklaying a steel furnace as apposed [sic] to, say a copper furnace, or something like that?

A I have never been in a copper furnace, but a fellow like myself, I know I sound like I am blowing my horn, but when you had the type of background that [11] I had as far as steelmaking furnaces, I say we were very diversified; blast furnace, coke oven, reheat furnaces, open hearths, ladles, Bessemers, the whole bit. And when you can do them, you can do anything.

So essentially, yes. With Harbison-Walker I had worked a couple kilns which I had never seen before, but I was able to do it because it's that type of work; arch work, tie and bonding, that type of thing.

Q Okay. You say you worked about six years as a bricklayer with the AFL. That brings us roughly up to about '62, '63, somewhere in there. What did you do after you worked with them?

A I worked for Sears for awhile. In fact, it was late '61, November of '61, I believe it was, I hired out with Sears as a home improvement salesman, stayed with them about a year. And that was strictly a commission job.

And while I was working there, a friend of mine asked me to sell some upholstery for him. He had an upholstery shop. I worked the two jobs together.

Q Were you still doing bricklaying during this period?

A No—oh, I was doing, but not—for friends and neighbors, that type of thing. Little fireplaces, garages, maybe a porch. I had kept active at it, but [12] not in the steel industry part of it.

Q What was the reason for—that sounds like it's a pretty drastic switch from being a bricklayer in the steel industry to a home improvement salesman and upholstery—

A What happened, back in the very late '50's and early 60's, and we say it with—I won't use the word—but anyhow, bricklayers, so called bricklayers from the south, we called them rebels, and they come up and eat us alive. We were making 60, $70 a thousand for laying up a house. They were doing the same job for maybe 35, 40. And contractors were looking for cost cutting, and just wiped us out. There was very little—

Q They were nonunion bricklayers?

A They were all nonunion, and just eat us alive. So I went from Sears to two different insurance companies.

Q You were with Sears for about a year?

A Approximately—approximate.

Q Then you joined a couple insurance companies?

A I went with National Life of Tennessee. When I realized what it was, I got out as quick as I could and went to Phoenex Mutual. And from there I went [13] into Harbison-Walker.

* * * *

Q Okay. Then you went to the Phoenex Mutual. Was that a different type of company?

A That's a whole life company. That's the big outfit.

Q How long did you stay as an insurance salesman with Phoenex Mutual?

A Maybe six months. That's when I realized I didn't have enough formal education to qualify myself in that type of a company. That, and it was very difficult knocking on doors cold turkey.

Q Now, when did you join Harbison-Walker?

A June 7, 1965.

Q And what position did you start in for Harbison? [14] A I don't know what the title was, but when Dresser took over in '68, they referred to us as installation specialists. I still had the same job, it was just different title name. I don't recall.

Q Okay.

A Just a serviceman, I guess.

* * * *

Q When you joined Harbison-Walker in '65, what were your day to day duties? You said there wasn't much change in the duties when Dresser took over.

A Basically, they had an installation, they needed the skill of a mason familiar with the art of [15] industrial bricklaying. I went to the plants, and at first they were mostly all new installations. I had to show the customers' people the technique that is required to lay up a job properly, to give them maximum life. And to also

troubleshoot after the linings are in and the furnace is on-line.

I would go to the plant while they are working the furnaces, and help them where I could in regards to what they might be doing wrong, or what they can do to help themself as far as slagging the bottoms up, and doing protective maintenance to prolong the life of the lining, and to take wear diagrams of the furnace after it's been torn down, come off-line, and to read the lining to show them the different qualities of brick that would give it a perscription [sic] type lining to equalize the wear. The secret was to try to wear the lining from top to bottom equally, all the way through.

Q Would you be involved in supervising the installation, or would you just be onsite to answer any questions that came up?

A Both. Both. In some jobs, on brand new installations, I would actually do—I would supervise the—I would instruct the foremen what brick are needed, let him know how they were to be [16] installed, and go into the furnace and actually watch this take place, make any corrections where necessary. A lot of it was just hand holding, it was on calls that were PR type of things.

Q Was there any changes over the course of the 17 years that you worked at Harbison-Walker in what you did?

A About the only change was about that of responsibilities, that's all.

Q What do you mean by that?

A When I initially went out, I went out with people. After I was there awhile, people went out with me.

Q Okay. So in terms of—

A In a lot of cases, most times I worked solo, knowing how to read a print, sketch them. Before Dresser took over, I would make sketches, I would do—make counts, furnace counts.

Q What's a furnace count?

A How many brick went into a lining.

Q Okay.

A Try to design a furnace that would wear equally to give them prolonged life.

Q When you say try to design, what do you mean? You didn't actually do design work on the [17] furnace, did you?

A Not the shell. The masonry portion it it. Lot of people are not aware that in a particular furnace there is not a single quality of brick, there is many qualities, because there is wear spots. Of course, we put our premium in the wear spots, and put our lower price brick in spots that doesn't take that type of wear, try to balance it out. Wear pads, we called them.

Q Now, would Dresser or Harbison-Walker, would they be paid by the customer for your time, or did they bill on an hourly basis? How did that work?

A The way I understand it, international jobs, the customer would pay for my time. Domestic jobs, it was in the cost of the brick.

A lot of these new installations were done by contractors, and I would oversee the contractors. I acted as a liaison between the contractor and the customer.

Q Okay. These were situations where the contractor would be the person who had the contract for actually installing the brick?

A Right. And they had to put it into our instructions.

Q Okay. Who were your supervisors, let's see, say [18] during the last ten years of your employment at Dresser?

A Ken Hanson, Bill Hekaras. . . . And Larry Sheatsley. Of course they were the head of the department. I, in, turn worked with, many years with—I reported to a fellow by the name Carl Willenbrock. . . . And after Dresser took over, he got transferred to Colorado, and a fellow by the name of Chuck Wenrich came in, and I reported to him. He was responsible for my jobs, and where I would go.

Then, I don't remember just when, but I guess the last couple of years or so, he more or less gave that up and Don Jamison took that over, under Larry Sheatsley.

Q How would you get your assignments?

A Through these three people. Carl Willenbrock, Chuck Wenrich and Don Jamison.

Q What would you do on a day to day basis? I take it you would get a call—

A The last four years of my employment I worked out of my home. I never reported to the office, [19] except to turn in sales reports, expense accounts.

Q Okay. Prior to that, how did it work?

A I was mostly on the road. When Dresser took over, they told us that they didn't want any of us people—by "us people," I mean the people without the college degree—doing any paper work, except for our reports, installation reports.

Q What do you mean by paper work?

A Surveys, sketches, things of this nature; laying out furnaces.

Q Are these things that you had done before?

A Always. I was very much involved in paper work and the day to day operations of the office.

Q And that was during the first three years, I take it, of your employment?

A Yes.

Q Okay.

A That was the most enjoyable three years. Because I was one of them kind of guys, I just couldn't wait until I got to work, and a lot of times I would take a short lunch hour and stay right up to the hour before I left.

I had a hell of a boss, that Carl Willenbrock. He believed in me, and he trusted me, and he gave me a lot of authority—not authority, but responsibility. [20] Then when Dresser took over, it was a completely different format. We had what we called sales, and they went into what they called marketing, which is a gourmet way of saying sales, I guess.

Q Now, you mentioned three things when I asked you what paper work constituted, you said surveys, sketches and layout of furnaces. What do you mean by surveys? What does that include?

A Like, Ford Motor, they had a BOF shop. They were having problems. They weren't getting the lining like they thought they should. So what we got from them was a series of heat records. We'll say they had 250 heats on a lining before it come off-line. In every heat they made, it had a chemistry to it; how much sulphur, carbon, how much flux added, how many reblows, how often were the reblows until the heat was tapped, tap times. They had all this information listed on each heat.

And what I did, I guess there were 21 or 22 of them at the time, 22 linings I did a survey on. I took and I broke it all down, and I was able to give them the averages of what their chemistry was of the heats, their reblows, how often they reblew, the length of their heat, the amount of tonnage per heat averages, and it was quite a comprehensive thing, and [21] gave them an idea of what they were doing wrong.

Q And that's what you mean by a survey, just trying to trouble shoot or figure out what the problem is?

A That was one type. And just before I got laid off, I was doing a survey for electric furnaces. We had a list of all the electric furnaces in the country. What we had to do, find out—this was for marketing purposes—to find out what brick went into what furnace, and what percentages, so they knew how to set up their manufacturing schedule so they wouldn't be overstocked. I never did get to finish it.

Q Okay. So you were continuing to do things like surveys even after Dresser took over?

A Well, they called us back into the office in February of '82, and Dresser said that these people, meaning myself and another guy, were not earning their keep, because there wasn't enough roadwork. So bring them in the office and give them something to do. And that is what one of my jobs were.

Q Who was the other guy they mentioned?

A Al Malarich, that's M-a-l-a-r-i-c-h.

Q Now, you said that for the last four years of your employment, you worked out of your home. What [22] would—

A Except for the last four months before I got laid off.

Q After this February of '82 meeting. Prior to that, what would you do? Prior to this four year period where you worked out of your home, what would you do when you didn't have an installation project to be going to?

A You are not going to believe this, but I sat in that office and read magazines and books. That was all they would let us do. That was very demoralizing. Very. When the rest of the company come down, say, "Hey, what you got here, a good book?" and never raise hell with you, you knew it was bad. But they just did not want our people, or Al and I, Joe Scott, Rudy, to do any kind of paper work.

Q How much time was—

A Eight years I did that.

* * * *

[23] But my question was going to be how much time out of a typical week would you be spending in the office reading magazines and books?

A Oh, it would be—there would be periods I wouldn't be in that office for three or four weeks at a time. And when I would be, generally, two days at a time. They kept us pretty busy on the road. After we made our sales reports out, then nothing else to do.

Q Sales reports, you mean installation reports?

A Right. They called them sales, installation reports.

Q Okay. You mentioned that you and Al Malarich were among the employees who were not permitted to do anything other than these activities, and you also mentioned Joe Scott and Rudy?

A Yes, Joe Scott retired, and Rudy was killed.

Q What's Rudy's last name?

A Cubakovic, C-u-b-a-k-o-v-i-c.

Q These were both installation specialists?

A There were four of us.

Q When was Rudy killed?

A I could tell you it was a Wednesday. That's about as much as I could remember exactly. But I will [24] say nine years ago.

Q And Joe Scott, when did he retire, approximately?

A About three years before I left. I would say '79.

Q Do you have any idea how old Rudy Cubakovic was at the time?

A At the time, I think he was 57 or 58.

* * * *

Q Now, what was the reason, or was any reason given for this change as far as your work—you are reading these magazines in the office, and then I take it you were told you didn't have to come to the office when you didn't have an installation project?

A Well, after eight years of this doing nothing in the office except for our sales reports, they decided that we were getting to be a pain.

What we were doing before was, we decided that [25] we were going to have some fun, so we just went and bothered the other guys deliberately. The boss got mad. Because the other department was doing it for years. Their people were working out of their home, and we felt we were entitled to the same thing.

So we just pestered him enough till [sic] Ken Hanson says, "Okay you win. As of today, you are working out of your home."

So I got myself a telephone answering system to keep in touch. And in all that time, in four years, they never waited more than 15 minutes to get ahold of me.

* * * *

[27] Q Now, during the period, the four year period that you were working out of your home, I take it you

would be called by Jamison, or whomever was your supervisor, and be told, "We have an installation," or whatever, "go to this job or that job"?

A Right.

Q Okay. And so during periods that you did not have an installation project to be present at work, what did you do?

A Stay at home.

Q Okay.

A It was my thought that they felt that I had enough talent that they could trust me to do it.

Q Was your compensation at all tied to the number of installations that you went to, or anything like that?

A Not to my knowledge, no.

Q You received a monthly salary, I take it?

[28] A Right. Monthly salary, and quite a few—every year, a merit raise. Some were not as heavy as others, but the last four or five years we were getting cost of living raises.

Q But that monthly salary would never be reduced if you just happened to—

A Never. Never.

Q —not have any installations for an extended period?

A No. No.

Q Okay.

A Always stable.

Q Okay. Did you notice any decline in the number of installation projects that you were being called for, let's say from 1980 forward?

A From when?

Q Let's say 1980 forward, to the time of your retirement.

A 1980, things were getting a little bit slow, but not bad. They kept us busy. It wasn't until '82 that things started dropping off a little bit. And that's when they asked us to come into the office, in February.

Q Okay. Now, who were the other installation specialists, other than these three that you have [29] identified as being in the non ferris? Group, who were the other installation specialists working, let's say in 1980, in your group?

A Just the four of us. There was Al Malarich, myself and Joe Scott, and Rudy was already dead. Just three of us.

Q Okay. And Joe Scott you say retired shortly before you were laid off?

A He retired, if my memory serves me collectly [sic], in '79.

Q Oh, okay, I am sorry. Was he replaced by anyone?

A No. Just made the work a little bit tougher, that's all. Not tougher, but kept us busier. We took up the slack.

Q How about Mr. Meixell, what was he?

A I really didn't have the a chance to spend too much time with Mike. If I remember correctly, he may have come in—in fact, he did come in as an installation man. But he worked when I was home. He stayed in the office.

Q You don't know whether he was also classified as an installation specialist?

A He was.

Q He was? Did he replace Scott, then? When did [30] he come on board, roughly?

A He was only there about, maybe a year and a half or so. Possibly two years.

Q What was his background?

A He was a mason supervisor for Phoenix Steam out in the eastern part of the state.

Q And do you know whether he did the same type of—at least to some extent, he did the same type of installation?

A Right.

Q Supervision and—

A Right.

Q Okay. But he did not work out of his home, he worked in the office?

A He worked out of the office.

Q Do you have any idea what kind of things he would do when he was in the office, not on an installation project?

A Like I said, I was at home. I really had no idea what he was doing. Not too much of anything, but he tried to keep himself busy.

Q Okay. So the fact that you were at home means that you don't have any knowledge of what he would do when he was in the office?

A No. I have a rough idea, but I couldn't say it [31] was so.

Q You are just assuming?

A Yes.

Q Okay. How about Mr. Faust, was he—

A [Hugh] Faust?

Q Yes. Was he classified—

A He mostly was an office boy. He was originally a correspondent, and he came from the correspondent's office over to our office as a correspondent. I don't know whether that was his title, but he kept in touch with the rental cars, and did other odds and ends of that sort. Nothing technical.

Then towards the end, he would go on a few installation jobs here and there with somebody. He was more or less trying to break him in as a trainee type of thing.

* * * *

[32] Q So as far as what Mr. Faust did on a day to day basis, let's say during the four years prior to your layoff, again, you don't really know because you weren't around the offers [sic] during that period?

A The best I would say, and it sounds demeaning, and I apologize if it does, but he was more like a gopher [sic].

Q Okay.

A You know, the odd man out, so to speak. If there was an installation, he didn't have nothing to do, he

would go out and sub for them. He never went on a job, to my knowledge, by himself. He was always with somebody.

Q Okay.

A He had no background or training in this particular type of field.

Q When you say he came over from the correspondent's office, what do you mean by correspondent?

A Correspondents, the people that make up a price list of a particular job. If a salesman come in, he said he had an order for such and such, or a bid, he [33] made up bid prices on jobs.

Q Okay.

A He would come over to us and get the amounts, and he would price up the brick.

Q Would he correspond with vendors and thinks like that?

A More or less, yes.

Q Anything else that you're aware of that he did?

A Well, customer called up and said, "Hey, I got a ladle, how much do you want for it? Do you know how much it is going to cost me?"

They wouldn't necessarily call him, although occasionally they may have. But for the most part they called one of our people or the salespeople, and we gave him the information that he needed X number of brick, so many of these, so many of those, different qualities.

"What's the ladles going to cost me?" He would figure out the price.

"How much is 20 ladles going to cost?" And then management would look at it and possibly give him a price off of that.

Q How about sketches or specifications?

A Nothing of that sort. He could look up specifications, but he wouldn't be able to make them. [34] He did that in correspondent's work, specifications.

Q He didn't do any drawings or sketches?

A No.

Q Who would do the surveys and the sketches and the layouts of furnaces, then?

A Mostly engineering, although we did a few ourself. What we would do is give engineering the measurements of a particular shell for an open hearth, or a BOF, or whatever the case may be, electric furnace, and tell them what brick go where.

Then they would send down to engineering, they would figure out the counts. The counts would go to a fellow like the correspondents, and he would price it.

Q Now, you referred to a meeting that occurred in February of '82, when they told you they wanted you to come back into the office. Who was present during that meeting?

A I know Larry [Sheatsley] was there. He is the guy that called me in. I think he was the only one. Don may have been there, stepped in and out. They told me the purpose of the meeting was because Dresser was complaining that we didn't have enough work to keep us—to warrant our income, and bring us in the office, give us something to do.

Q I take it business was down at that point, so [35] you weren't—

A Yes. But it wasn't drastic at that point. And it was at this meeting that I asked them, "What's the chance of me getting laid off?" And that's when he told me, "You won't have nothing to worry about." He also made the statement two years before on my 15th anniversary

* * * *

Q And who else was present? Was Malarich there in this meeting as well?

A No, it was just me.

Q Had a similar meeting occurred with Malarich, to your knowledge?

A I guess it did. It's only conjecture on my part, but I am sure he had the same thing.

Q Because he started going into the office at that point as well?

A Yes, he started then, too.

Q Had you heard rumors of a layoff, or anything like that?

A Well, I knew they were laying the office work off, mail carriers and few correspondents, and in the districts they were laying a few off here and there, but nothing heavy. One of the plants had shut down, [36] but then it had been shut down, off and on, for ten years. That was because of compitition [sic], not because of slow downs, labor problems.

Q So were you getting word at that point that you might be laid off?

A It come to thought, because I had been laid off in '72. And I felt that was very unjustified at the time. I had just had a pretty good bout of cancer, and while I can't proof [sic] anything, I felt that was one of the reasons—I was having mental problems with it. At that time they laid me off when things got a little bit tight.

Q How long had you been laid off on that occasion?

A September 16 to the 9th of January the following year.

Q So, about three months?

A Closer to four.

Q Had anybody else been laid off during that period?

A Four of us.

Q All of the installation specialists?

A No. . . .

* * * *

[37] Q Okay. Were there any installation specialists retained in that layoff?

A All but me. And it was at that time they had a young fellow there that had six months service, and they kept him and let me go for awhile.

* * * *

Q And he was an installation specialist?

A No, he was a product specialist, but he did installation work. It was just a different title, that's all.

Q Well, who were the other installation specialists that were retained [in 1972]?

A Al Malarich, Rudy Cubakovic, Joe Scott, and I got laid off.

* * * *

[38] Q So as of February of '82 you were concerned that—I take it you weren't really concerned by that point?

A The wife to be was. . . .

* * * *

Then Larry told me that I didn't have anything to worry about. Then there was this letter, newsletter from this here personnel director out of Dallas, made a statement to the effect that—I interpreted it meaning me, while it wasn't by name, by position—they were going to hold on to people with experience and time, and other considerations. And she was feeling a little bit better, but she wasn't convinced.

Then it was right after that that I got a letter [39] from my boss giving me a $1,000 raise, $4 short of a thousand, thanking me for my excellent efforts and the good job I was doing, and so on and so forth. When I showed her that, "You don't think they are going to get rid of you. They don't give a $1,000 raise to somebody they are going to layoff."

So I was scheduled to go to Turkey, and she says, "Let's get married after you come back from Turkey," because it was just one of them kind of deals that international jobs, you are never sure when they are going to be taking place. So they just kept putting off—we didn't keep putting off, but the customer.

So finally I got the call to Turkey, and we, in the meantime, had made plans and got our license and everything. We were pretty sure when the date was when I

was leaving. So when I came back from Turkey, it was on a Thursday, we got married on a Friday.

Following Monday, after a week's vacation—we took a week's vacation, and the following Monday went back to work, I went to Erie to do a job. Come back Wednesday night, went to work Thursday morning. Larry wanted to say something to me, and he was a little flushed in the face. And he says, "I will catch you later."

[40] So I sensed something was coming off. So I asked Don Jamison early in the afternoon, I said, "Don, what's happened?" I said, "Layoff is going to be that bad?"

That month they had quite a bit of layoff in our department—not our department, but our office. And when I come back, I said, "Don," I said, "how bad is it?"

He says, "It's real bad." He walked away from me, he didn't want to tell me because he knew. And 20 after 4:00 he called me in, and 4:30 I was gone.

Q Going back to February of '82, you said you weren't real concerned, but your wife to be was. Had you started looking for another job by that point?

A No.

Q Okay.

A I had no reason to, because I was assured that this wasn't going to happen.

* * * *

[41] Q Are you aware of any potential openings in other companies, or did you become aware at that point, let's say February of '82, up to the time of your layoff?

A At that point, being on the road as much as I had, I talked to competitors, installation people, and they were all fearful for the same thing I was. All of the refractory companies were laying off, all of them.

Q So the answer is no, you weren't aware of any openings that came up during that—

A No. No.

Q —February of '82 through July of '82 period?

* * * *

[42] Q Now, when you started working in the office again after February of '82, you said one of the things you were assigned to do was a survey for electric furnaces.

A Uh-huh.

Q Was there anything else that you worked on during that period?

A That was a pretty comprehensive job, I mean, took a lot of searching. I had to go through all the files, and engineering, find out what type of furnaces [43] they had, make of them, the size of them, whatever.

Q Okay.

A Then there is not just a couple, there is several, 2, 300 electric furnace shops in this country. Some of them are just tiny little things. Some are only, like 1200 pound furnaces, some are 400 ton furnaces.

Q So that was the sole project you worked on up until the time—

A That, and my reports.

Q Now, I take it that business continued to decline during 1982 in terms—at least measured by the number of installation jobs you were working on?

A Right. Right.

Q Okay. Did you hear any rumors about possibility of layoffs among installation specialists?

A Never. Never got a hint. That's what threw me off. There was never a hint.

Q Okay. Now, you referred to a letter that you received at the time that you received a $1,000 compensation increase. When did you receive that letter?

A May. It was late in May, but it told me that I had gotten the raise for the 1st of May, but he didn't let me know until later in the month, because it [44] wouldn't have been—I wouldn't have seen it in my paycheck until the first pay.

Q You knew you were getting a raise, but you didn't know what the amount was until—

A He told me, $83, which comes to $996. I had called it a $1,000 raise.

Q Okay. By he, are you referring again to Mr. Sheatsley?

A Don Jamison.

Q Okay, Don Jamison.

A And that was catalystic, caused my wife to say "I do." Then 13 days later, they lowered the boom.

Q Had you ever received a letter like this with your merit increase in the past?

A I am sorry, I didn't quite hear.

Q Had you ever received a letter from Mr. Sheatsley or Mr. Jamison on past occasions when you were given merit increases?

A No, I got phone calls telling me, but never a letter.

Q Okay. And what was said in this letter, again, by Mr. Jamison?

A I can't repeat it verbatim, but, "Dear Gene, in case I forget to tell you, there has been an $83 increase in your pay. This is reward to thank you for [45] your excellent efforts"—"for your fine work and excellent efforts."

Then he goes on to tell me about a job that I had to do at Bayou Steel, and mentioned the Turkey job to me, that will be coming up soon. Then he signed it off, "Thank you for your excellent efforts," or, "fine work."

Q Do you still have a copy of that letter anywhere?

A I have the original. Letters like that I don't—comments like that I don't let go by.

Q Now, back in the February meeting, you said that you specifically asked Mr. Sheatsley whether you were going to be laid off; is that right?

A Right.

Q What was his response?

A "You don't have anything to worry about." He said the same thing in 1980, August of '80. He said, "Don't worry about it."

Q What was the occasion of this conversation in August of 1980?

A My 15th anniversary. I was called in, like two, three weeks before. He said, "First chance you get,

come in." He said, "We would like to take you to lunch." [46] So Larry and Don Jamison, I called them and asked them if such and such a date would be all right, I am guessing now, but somewhere in the middle of August, we'll call it the 15th. So I come in, and at lunch time we went over—I don't even know the name of the place, right next to Hornes, there, fancy place—and we got to talk about one thing and another.

I says, "By the way," I says, "things look like they are going to get a little bit tight in the industry." I says, "What's the chance of me getting laid off?"

He said that, he says, "Not enough to even talk about it. Don't worry about it."

I said, "Well, I was laid off in '72, and," I says, "I wasn't warned then. And I thought it was little politics played then."

Larry says, "I don't want it to happen again." He says that, "Don't worry about it."

Q That was Mr. Sheatsley again?

A Uh-huh.

Q And this conversation occurred in Mr. Jamison's presence?

A Yes. The three of us.

Q What had caused you to be concerned at that [47] point? I thought business didn't start to slack off until '82.

A Well, Youngstown Sheet and Tube went down in Youngstown, Ohio, segments of different plants that you don't see in the newspaper, because I was going through all these places, and we were privy to a lot of this information that the general public wasn't.

And Gary shut down a little piece of their's, and somebody else shut a little piece of their's down, and different places. Well, it still looked like it was going strong. You could see the writing on the wall. And Carter was doing a pretty good job of killing things off then.

Well, I just had a feeling something was going to happen in another two or three years, because I called this shot 10, 12 years ago, I saw it happening. I could see

what was happening in these mills. They weren't putting any money into them except for new melt facilities.

You could read in the Wall Street Journal. Machine tool manufacturers, they just weren't producing like they were. They were having hard times. And it takes a while from the time they started getting hit until we started getting hit, because this machinery ages, it's not being replaced, [48] something is going to happen.

And the mills were getting old, and they weren't putting any money into them, they were bleeding them. And it's just little prudence on my part, I felt, that caused me to believe that it wasn't going to be good. That's why I was concerned about it. At the time I wasn't worried about getting laid off then.

Q Okay.

A That was back in '80.

Q You weren't worried about getting laid off?

A No. No. Not at all. But I sensed something was happening, because I could see what was happening at these different steel mills. They shut blast furnace down in U.S. Steel, then Youngstown Sheet and Tube went down, closing up some mills. It always has an indirect effect on us, eventually. It was directly.

Q During the period subsequent to this conversation in which Mr. Sheatsley said you didn't have to worry about anything, that's the August of '80 conversation, up until the time of your layoff, did you start looking for another job at any point?

A I had no reason to.

Q Okay. And again, did you come to know of any openings in the industry that you might have been [49] interested in, but passed up?

A There again, talking with our competitors, we were friends but competitors, I mean installation people, and they were telling us that one of their very younger people were laid off, or they are not hiring anymore, or things were starting to look bleak. . . .

And couple companies were on the verge of folding. . . .

• • • •

[50] Q Let's go up to the point when you were advised of your layoff. Could you tell me again what day that occurred, and exactly what the conversations occurred on that day were?

A Starting in the morning?

Q Yes.

A When I come in, we had just moved our offices. Our offices where I was then located had been remodeled. And I had just come off a job. I hadn't been in the office at all. I was on several different jobs, actually, and I hadn't seen the new offices much.

When I come upstairs they said, "This will be your desk here," (indicating). And I went to see Larry. And he says, "Hey, I understand you did a real good job over at Turkey." [51] And I says, "Thank you."

And he said, "By the way," he said, "I would like to talk to you about something." And he got real flushed in the face. And he said, "Awe, never mind, we'll talk about it this afternoon."

I said, "Okay." Then he walked away from me.

So I went ahead and did all my installation reports for Turkey, and this job up in Erie, made out my international expense account. And I do believe the domestic expense account was due, so I made that one out. They kept me busy, pretty much, during the day.

So 20 after 4:00 the secretary come over and says that, "Larry wants too [sic] see you." I just had a feeling. I didn't know what, but I had a feeling.

So I walked in. He says, "Gene," he says, "I got bad news for you."

I says, "How bad?"

He says, "Very bad."

I says, "How bad is very bad?"

He says, "We got to lay you off."

I just plopped down in the chair. I was just—almost speechless. And I says, "How many?"

He says, "Just you."

I said, "Just me? You are picking me out [52] first?"

He says, "Yes."

I says, "Why me?"

He says, "We got to start somewhere."

I says, "Larry," I says, "I didn't think this was going to happen to me." I says, "I can't believe you did this, because you said it wasn't going happen to me."

And he said, "Well, I can't say that I wasn't completely not to blame." He said, "I had a little bit to do with it."

I just—I don't know what I was doing. Just trying to hold my breath, keep from screaming or something. I just sat there. Then he goes about and tells me that in the event that I am laid off for more than nine months, and I get hired back, I would be hired back as a new man.

He says, "But when we let you go," he says, "we're going to give you two weeks pay." I guess that's their two weeks notice, plus whatever vacation pay you have coming, which I had three weeks. And I asked him about Al Malarich, I said, "Why Al Malarich and not me?"

He says, "Well, Malarich is a better man than you." [53] I said, "Oh? That's a joke," and there was a little politics played. And, "Hey, I got more time than Al."

He says, "You do?" I had absolutely, about 15 months. So he looks through the roster and he says, "Oh, you do, too."

And I didn't have anything more to say. Finally he says, "Do you have anything else to say?"

I looked at him, and I tell you, I was never so humiliated in my life, but I wasn't going to let him get away with it. We had a fund in the office that when somebody died we sent them flowers, when somebody got married they take a collection and give them a gift. And I didn't want to ask for it, but I felt I had it coming to me, because I paid my five bucks every time some-

body got married, and I kept the office fund going. Not myself, of course, but I put my share in there.

And I says, "I got one question to ask you." I says, "I am very, very embarrassed, and I don't want to ask you, but I am going to have to ask you anyhow." I says, "I put in many a five dollar bill for wedding gifts, but," I says, "I don't see any here for me."

And he looked at Don, Don looked at him, and he says, "Oh, we have one here for you," he says, "forgot [54] to give it to you." He said, "It's out there on the coat rack," which is like a tree stand. "In fact," he says, "I even put into it and signed a card myself."

I had only been married 13 days at this point. I says, "Do you know what this is going to do to me?" He didn't answer me, just looked at me. I said, "You just buried me." I says, "Nobody will hire me."

He says, "Why?"

"Who wants anybody my age with a history of cancer?" And he just looked at me, didn't say nothing.

So I got up to leave, and he says, "Don't forget your gift." He didn't even have the courtesy to get up and hand it to me. I had to go get it, pick it up myself and walk out of that office. I was so upset, I couldn't even cry. I was completely demoralized. I almost needed physical help to help me out of there, I felt so weak.

Q Was Jamison, you said—

A He was present. But he didn't say nothing.

Q But he was present during the entire conversation, and you had seen him earlier and asked him how the layoffs were?

A I just asked him, "How is it?" He knew what I meant.

[55] He says, "Real bad."

I says, "That bad?"

He says, "Real bad." Then he had a little—just slightly flushed. He turned around and walked away from me. He said, "Don't look good," that's what it was. He said, "Don't look good at all."

For the record, it was a very unconscionable act.

Q Now, how long had this little conversation with Jamison, how long prior to the meeting had it occurred?

A Half a minute, if that long.

Q Oh, okay. So you were walking with him together into Sheatsley's office?

A No. No. This happened somewhere in the neighborhood of right after lunch. He was in his own office, and I just happened to walk in. I said, "Don, how bad are things?"

He says, "Real bad," and he got up and walked out. And that was the last of it. Wasn't even 15 seconds, then, when the secretary called me in, 20 after 4:00, Don was already sitting there with Larry.

Q And the only person that you asked about as far as why you were being laid off instead of this person, was Malarich?

[56] A Yes, that's the only one. Then I asked him about these young kids. I said, "What about all these young kids?" And he just wouldn't say nothing. He just sort of shrugged his shoulders.

Q So you did talk about other employees?

A I didn't name names. Al Malarich is the only one I named by name. The other ones were just, generally speaking of the younger kids.

Q And who were you referring to there?

A Oh, there was a dozen of them with less than maybe a year's service, if that much. I says, "I got more time than anybody in this office except for the supervisors and the product managers." There was only, like seven, eight guys ahead of me in time. I tell you, it hurt. Oh, did that hurt.

If I got laid off fifth or six or seventh, it wouldn't bother me as much as getting knocked off first.

Q Do you recall whether Malarich was in the office that day?

A I don't think he was. In fact—I would say no.

Q Was he on a job somewhere or what?

A He evidently was.

In fact he wasn't in the office that day, [57] because I was there all day and I didn't talk to him. See, here's what bothered me about Al Malarich. I have nothing against the man, no animosities whatsoever. But Al, when he come over to us from Homested Works, he was strictly open hearth. That's all he did. And throughout the course of our tenure together with Harbison-Walker, he come up to me many times, "Gene, how do you do this, how do you do that?" He went on jobs with me. I didn't go out on them with him.

He looked to me for guidence [sic]. He wanted to know about blast furnaces and all the rest. He had never done an international job. I have done a dozens of them. And, you know, you have to have some kind of something going for you to get international work. And they just don't send anybody over there; somebody they can trust and is responsible.

And I didn't go one time to one place, I went several times to several places, and it was a nice feeling to know that they trusted me to do these jobs, but they never, ever sent Al. Never. And to my knowledge, he asked for jobs. They were past work, but nobody used him.

He also made a senior installation specialist, and I wasn't, which was politics, or whatever other [58] word you want to use.

Q Now, he was older than you, was he not?

A Roughly a year and a half, maybe two.

Q Okay.

A But not in seniority.

Q Right. I understand that.

A And his economic situation wasn't nearly as bad as mine. His wife worked as a full time nurse. My wife wasn't working at all. According to this newsletter, they took these types of things into consideration. Most of these kids had wives, these young kids, newly married, both of them were working, and a layoff wouldn't have

hurt them near as much as me. They had 35 years to make up for what they lost. I didn't have nothing left.

Q Now, did you have any conversations with anyone from Dresser concerning your layoff, up until the point when you filed a charge with the Pennsylvania Human Relations Commission?

A I called the day I got laid off. Let's see, that was Thursday. Friday I called Don Stock, president of Harbison-Walker. He wasn't available. I went up to my camp site, and step daughter got a phone call sometime Sunday afternoon, says that "Don Stock called you." [59] I said, "Oh, thank God, I will get back on the job." So I called Monday morning. I says, "Don," I says, "what's happening here?"

A He says, "Well, we had to make a bunch of layoffs."

I says, "Is there anything you can do for me?"

He says, "No, Gene, I can't. I cannot interfere with the process."

I says" [sic], "You mean, that is it? You can't help me at all?" I says, "You are keeping all these kids, and your [sic] neglecting me."

Q And what did he say to that?

A He says, "I can't interfere with the process." He says, "I am sorry. Goodby [sic]." And that was it. And that's the last I talked to anybody from Harbison-Walker.

Q And then you filed a charge subsequently with the Human Relations Commission?

A Right. And at that meeting, I asked [Nicolella], "John," I says, "Why are you keeping these kids and getting rid of me?"

He says, "Gene, these kids are going to be our future managers." And that's all he said.

Q At what meeting was this?

A At the Human Relations.

[60] Q Down at the Commission office?

A Uh-huh. . . . And it was also brought up at that Human Relations meeting that Mr. Tort—I believe that's his name, don't quote me on it—asked them if they have any problems with me as far as discipline, and so on and so forth—no, he asked me, and I says, "Never, except for one. There was a misunderstanding," I said, "that happened just very recently." And I explained to him what it was, and John [Nicolella] had that information right in front of him.

He says, "Yes, it was a lack of communication." But I had never been reprimanded, I have never been suspended, I have never had a pay raise held back on me. . . . I had never had a pay raise held back, I have never been reprimanded, and I have never been given a suspension, I have never had a bauling [sic] out behind a closed doors, and in 17 years, I think that is a [61] pretty good record.

I have always done what I was ever told to do, never turned a job down, I was always available for any job any time of the day or night, and a lot of them job calls are on weekends, and I was always available.

I have never been called in for questions on my expense account. In, fact I did get called in, but not to discipline me, but to tell me that I did a real good job on the expense account. He says, "I wish everybody could do them like this," not because it was neat or anything, but it was decent and honest, and you have to be a mind reader to see if an expense account is loaded up or not. I never had any kind of problems. I guard that money as if it was my own.

* * * *

[62] Q Why don't we just start with, you have had an opportunity to review the document. Do you recall that this is a copy of the charge that you filed with the Commission?

A I do.

* * * *

[64] Q Okay. In paragraph C-1 you allege that "The Respondent retained younger, less senior, less experienced persons under the pretext that they were more deversified [sic] than me."

First of all, with respected [sic] to the last part of that allegation, where did you derive this idea that the pretext was that the people retained were more deversified [sic]? Was that something Mr. Sheatsley had told you?

A He didn't say it in them words, but he implied it as much as that they had more on the ball than I did, because they had a college degree, chemistry, metalurgy, industrial engineering type degrees, and I didn't. And that, as they mentioned in the Human Relations meetings, says that they are going to be our future managers.

Q Okay. So this was referring not to Mr. Malarich—

A No. No.

Q —but to these, you have referred to them as young kids?

A Right. Right.

Q Were any of those people installation specialists?

A No.

* * * *

(65] They did mostly office work, although they went out on occasion. Now, some of these kids I took out on the jobs with me, training them.

Q Okay. And you do recall Mr. Sheatsley, when you asked why they were retained, saying that because, among other things, they had college degrees?

A No, he didn't say that.

Q What did we say?

[66] A He just shrugged his shoulders. I told you that before. And I says, "Why me and not them?"

"We had to start somewhere," that was his answer.

* * * *

Q I am trying to find out what exactly he did say, because apparently he said something that caused you put this in your PHRC complaint.

A Okay.

He implied that they can do more than I can, that they have a degree, that they had more background than I had to do the job.

But I says, "Yes, but they are not bricklayers, and they don't know the physical characteristics of these furnaces as well as I do." I says, "They don't"—I do remember now. Okay.

I told him, I said, "They don't even know how to handle people. They have been thrown out of [67] plants"—not these particular boys, but in the past, young people go in there and start telling customers how to do things.

And I says, "You just don't do that to customers." And I says, "I have never been thrown out of a plant before because of poor workmanship or personality, or any other reason."

He says, "Can you do what they do?["]

I says, "No more than they can do what I do. I can do some of their work, but not all of it." For me to break down the chemistry of a brick, I can't. But then this is a very deversified [sic] office. Everybody is supposed to be helping another. That's why they have all the different engineering type degrees.

I guess you could say no man is an island unto himself.

* * * *

[68] Q Was the subject that these people had college degrees, did Sheatsley mention that at all?

A It was implied.

Q Well, that doesn't tell me. I can't go on what was implied. What did he say that implied that?

A They had more background.

Q Okay.

A They got schooling, or education.

Q Okay. These are things—

A He didn't mention the word degree. He knows that's a sore spot with me.

Q Okay. So he said they had more background?

A Formal training, or schooling.

Q Anything else that he said that led you to conclude that he was implying that it was their degrees, and that they were more deversified [sic]?

A I don't think so.

Q Now, is it true that all of these people that you're referring to as the younger, less senior, less experienced personss [sic] who were retained, they were all product—

A Specialists.

[69] —specialists; is that the title that they had?

A Don't quote me on it, but I think that's what they are called.

Q Product specialists, or product analyst, something like that?

A I don't think it's analyst. I think it's specialist.

* * * *

Q What does a product specialist do?

A Does the surveys that I spoke of before, all different type of surveys. I really never got into it that that much, because I was only—when I got called back in February, I still wasn't in the office that much. And when I was, I was doing my own work.

These kids, they had their degree and they felt they were so much better than anybody else, they didn't socialize with me at all. And it was "Good morning," "Good afternoon," "Good night," that was about it.

So for me to actually know what they got into, I can't say. I do know they were making—working on surveys, and they had the big computer readout sheets, and picking information off that.

Q Had you had any background working with [70] computers up to the point when you were laid off?

A No. In fact, there was only one man in the office that did.

Q Who was that?

A John—his name was right before mine on the roster. . . . Borfner. . . . And as far as the main computer in the main terminal, none of our people touched that.

Q Although they did work from reports from that computer?

A Oh, yes. The readout sheets. I did that, too.

Q . . . So is it true that you have really no first-hand knowledge as to what the day to day job functions of these product specialists were? You might know some of the things they did, but not all of them?

A Not everything, no. Their actual job titles, no, or job, no, I don't know.

Q Did they all have degrees of some sort?

A Everyone of them.

Q Were they engineering degrees?

A Yes. Some of them were. We have had people [78] that had history degrees, civil engineer degree, chemistry, history major, we had English major; very, very diversified office.

Q But the ones who were in these product specialists or product analyst positions that you're referring to—

A They were all college people. Everyone of them. And the only college people—the only people that weren't college people when I was still there was Mike Meixell, Al Malarich, Dick Dean, Hugh Faust and myself, that I could recall. Might have been another one in there.

* * * *

[79] Q We were talking about some of the younger people who were not laid off at the same time you were. . . . In paragraph 16-A of the complaint, you allege that the defendant retained younger, less experienced, less skilled employees with less seniority, and you want to say, in part, because your salary was higher than the salary of some of those employees.

Could you tell me what the factual basis for that allegation is? First of all, what employees are being referred to in that allegation; and secondly, how do you know what their salaries were?

A Well, as far as the salaries are concerned, it was against company policy to discuss them, although when we get a couple of the kids together, you can hear them talking. And some were making as little as 16, and some as high as 17,5 to start. And I knew that I was making a goodly bit more than that.

Q How about people like Meixell or Malarich, did you have any idea what their salaries were?

A I don't know what Meixell's was, nor Malarich's, although I am inclined to believe that Malarich was a [80] little higher than me, politics involved, again, there. He was considered a senior installation specialist.

Q Okay. So, then, he is not one of these employees that you're referring to—

A No.

Q —when you say his salary was higher? Okay.

Nor is he one, when you say it was in part because of your age, he is not an employee that was younger than you?

A No.

Q So is it, again, . . . these people with engineering degrees?

A Right.

Q And who were in the product analyst, product specialist—

A Right.

Q —type of work that you're referring to in paragraph 16-A?

A Right.

[81] Q Then in paragraph 16-B it's alleged that "defendant has begun to hire new employees under the age of 40 rather than recall plaintiff." What's the basis for that allegation?

A That was hearsay from a former employee at the other department.

Q Okay. What's the name of that employee that you heard this from?

A Harry Hrbacho . . .

* * * *

Q And did he identify who any of the individuals are that were rehired, their names?

A Two—wait, let me think. Should I say two or not? Himself, and a man from our department were both laid off, not necessarily at the same time. I don't know what the interim period was between layoff, but [82] they called him back for a particular job that lasted maybe a week or so, and let go again. And from my opinion, understanding of the other individual in our department, the same thing happened to him. He got laid off just before Christmas, and got called back some time after Christmas for a short duration.

Q Who was that employee?

A We called him Dick Dean, . . .

* * * *

Q And how old is Harry Hrbacho?

A Maybe a year or two older than me. 58, 59.

Q How about Dick Dean?

A Dick, two, three, four years younger than me.

Q Okay. Well, in paragraph 16-B it's alleged that the company has begun to hire new employees under the age of 40. Both of those would appear to be over the age of 40.

A No. No. These guys had been working with the company for quite a few years. They got laid off, called back for a short duration, and got laid off [83] again. I am referring here to brand new employees, period.

Q Okay, that's what I want. Do you know the names of any of the brand new—

A I have no idea whatsoever. Only hearsay from Harry Hrbacho.

* * * *

Q So you don't have any direct knowledge—

A No.

Q —of either the identy [sic] or the number of any new employees—

A No.

Q —under the age of 40?

* * * *

Q In paragraph 16-D of the complaint you allege that the defendant failed to transfer you to another department, or to retrain you, and insted [sic] trained [84] younger, less experienced and skillful employees, that you could have done with proper training.

Could you tell me which younger, less experienced and less skillful people you are referring to in that paragraph?

A There was two people that I know of, one was our secretary that was transferred to another department because they no longer needed her services in ours. And I am assuming that people younger than her in seniority —I think she went down to the, where all—the steno department, I guess you call it, and she got put back in there.

Then there was a woman in international department, from the way I understand it, from the way she told me, she was being demoted from international to another department because they no longer needed her services. They are cutting on costs.

And Dick Dean, he, from what I understand the way he explained it to me, he was being transferred to international for special project in South America, but it didn't last too long.

Q How long?

A It could have been a week, or two or three months for all I know, but it was just for a short duration; come back up to his original department, and [85] got laid off again.

Q What was his original department?

A Our department.

Q What was his position in your department?

A Oh, I don't really know. He wasn't considered had [sic] an installation specialist, although this is what he did. He wasn't a product analyst or a product engineer. I don't really know what his particular title was.

Q Okay. Now, let me just back up a minute with respect to this secretary who was transferred from your department to the stenopool. You are not suggesting that you should have been—

A No.

Q —transferred to the stenopool?

A No. I am suggesting I should have gotten that job in international, which I have been asking for for years.

Q That's the woman—

A No.

Q Let's talk about, next, the woman in the international department, and she was demoted to some other position?

A Right.

Q What was her position in the international [86] department?

A Secretary.

Q Again, this isn't a transfer—

A No.

Q So the one you are referring to in paragraph 16-D is the transfer of Dick Dean to a job in the international department for a special project?

A The way I understand it, the way he told me that he understood it, that it was going to be a permanent type position. But it turned out it didn't work out, . . .

* * * *

Q Let me clarify. Are you alleging that you should have received this job in international that Dick Dean received?

A Right.

Q Okay. Is there any other job that you're aware of that people were transferred to that you—

A No.

Q —think you should have received?

[87] A No. But there were other jobs I could have, possibly, have gone to. I could have gone over to Garber Research Center, I could have been retrained, take a demotion, lower my pay scale. I could have taken anything. But they never offered me a thing.

Q What are some of the jobs that you think you should have been transferred to, even this one, Garber Research?

A I could have been a bricklayer out there.

Q And it's your contention that their failure to transfer you into a bricklayer position at Garber Research was because of age?

A It was all based on age.

Q Did they transfer any of the other installation specialists into bricklayer positions at Garber Research?

A Not to my knowledge.

Q Okay. Did they transfer any of the installation specialists to any positions?

A No, sir.

Q Okay. Are there any other positions that you believe you could have been transferred to rather than having been laid off?

A I could have been sent to the works department, I could have run a piece of machinery, I could have [88] done most anything, really, anything in the mechanical field.

Q All of these positions would have required some sort of a training period for you?

A But with my background from the brick plant, it would have taken very minimal training, like maybe a week or two. Some jobs there I could have done right away.

Q Had you ever performed any of these jobs?

A Not directly, but indirectly. Using an air hammer, ramming, packing.

Q And are you aware of whether any openings existed on these jobs?

A No, I wasn't.

Q Okay. And I don't want to put words in your mouth, but as I understand it, your contention is that they could have transferred you into some of these positions even if they had had to lay off somebody else to do that?

A You would have thought, because of my seniority, even though—

Q Right, I understand. Say you have a ten year employee over here who is a bricklayer, you are saying they could have transferred you into that position and laid him off instead of you?

[89] A Bumped him back, yes.

Q Now, you go on to state that you were willing to take a cut in pay, if necessary. Did you ever express that willingness to any person at Dresser Industries?

A No, sir. At the moment, I was just too upset to even think of anything.

* * * *

[111] Q Now, you recall that in your conversation with Sheatsley, and Jamison was present, Sheatsley did make the statement that the reason for the lay off was economic, that business was down; isn't that correct?

A He didn't say it in them words, but he implied as much, which I knew. He did say business was bad.

Q Okay.

A And like he said, he had to start somewhere, and he started with me.

Q Do you have any facts, or are you aware of any facts that could contradict that position that business was bad, and that that was the reason for the layoff?

A No.

* * * *

[113] Q During the period of your employment, did anyone at Harbison-Walker ever make any comments

about your age, or about—in the sense of it having an effect on your future with the company?

[114] A No. They wouldn't dare.

Q You are not aware of any comments being made by Mr. Sheatsley or Mr. Jamison or anyone else at or around the time of the layoffs that they were trying to get rid of older employees and keep younger employees, anything like that?

A Exactly, yes.

Q What comments are you referring to?

A No comments, but their actions, what they did, was in the first part of, I would say February or March, around that area—

MR. LOGAN: Is this of 1982?

A '82. —they sent out letters to all people who were 60 or going to be 60 in the year 1982. And they offered them a pension. Two people in our department took it.

* * * *

And from what I understand, there were 38 people in the Pittsburgh office that took advantage of it.

Q Did you receive a copy of that letter?

A No. I wasn't 60, or going to be. But the [115] receipients [sic] of it told me what they got. In fact, the ones who turned 60, or were 60, were being paid by Harbison-Walker for two solid years their income and benefits, the whole ball of wax, until age 62, at which time they will take their social security benefits and company pension.

Q All right. Other than this letter that you say was sent out to employees about what, an early retirement? Would that be an accurate description of it?

A Right.

Q Other than that letter, are you aware of any comments made by anyone at the company concerning, or that would reflect a desire to get rid of older employees during this layoff?

A Nothing that I had ever heard.

Q Okay. How about that anyone else might have heard that might have been related to you?

A It was never discussed.

Q So you don't have any knowledge, regardless of its source, of any comments?

A I am not saying it didn't happen. I am saying I didn't hear anything.

Q Nor did anyone hear it and relate it to you?

A No. . . .

* * * *

[117] Q In paragraph 5-C, or—I am sorry—C-5 of this PHRC complaint, you allege that the respondent maintains a policy of laying off personnel based on their seniority and skill requirements.

Am I correct in saying that the sole basis for that allegation is the newsletter that—

A (Indicating.)

Q You are showing me here a newsletter?

A "I can assure you we don't take layoffs lightly. They are very serious decisions, and we realize the seriousness of the impact on each household they affect. In fact, layoffs are implimented [sic] only after an extensive review of alternatives." They couldn't possibly have done any review on me.

"Obviously, layoffs, when they are necessary, occur in departments or operating units most affected by the business decline. Length of company service and skill requirements necessary to carry out the [118] reduced business activities are the most important considerations."

MR. LOGAN: Mr. Brieck, what document are you reading from there?

THE WITNESS: This is the spring edition of '82 Dresser News sent by way of Dallas. . . . Page one, top right-hand column.

* * * *

Q Is there anything other than that newsletter reference that is being referred to in paragraph C-5 of the PHRC complaint?

A (Indicating.)

Q That's the only thing?

A Only written thing.

Q How about any stated—

A Well, I got that letter that was for the thousand dollars raise that led me to believe that it wouldn't happen to me, although it's related to it, not directly to this particular article.

[119] Q Yes. But my question is, to a policy of laying off based on seniority and skill requirements, the only thing that you're aware of that supports that allegation is the newsletter article?

A Right. If they have a policy book, it's not privy to the people, other than the top officers.

Q I see. You have never been given an employee handbook, or anything like that—

A No.

Q —that relates to that?

A I am sure there is one, but I have never seen or heard of one.

Q You don't recall receiving an employee handbook?

A No.

Q The only thing you were relying on was the newsletter, and the letter from Jamison?

A This problem, I almost have to flip a coin which convinced me most I wasn't going to get laid off, the personal letter or this. Between the two, they weighed a ton. . . .

* * * *

[120] Q Just one last question, which maybe might permit you to make whatever summary you would like. Other than the facts and the answers that you have given me this morning and this afternoon, are you aware of

any other facts that in any way support your allegation that age was the reason for your layoff?

A Only because they laid the older people off, they were pensioning them off, gettin rid of that economic burdon [sic], as they call it.

Q Anything else?

A Not offhand.

* * * *

EXCERPTS FROM THE DEPOSITION OF LARRY SHEATSLEY

(Record 180a-234a)

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[6] Q. Mr. Jamison was Mr. Brieck's supervisor?

A. Correct.

Q. Did Mr. Jamison report to anyone in between you and him?

A. No. He reported directly to me.

* * * *

Q. To your knowledge, had Mr. Brieck ever been reprimanded, counseled, warned or disciplined in any way by Haribson-Walker because of alleged poor work performance?

A. Well, I'm aware of one minor incident in the latter days of his employment.

* * * *

[9] Q. When you say there was one minor incident, Mr. Sheatsley—

A. That I'm aware of.

Q. I just want to look at the term "minor." Was any [10] note of this placed in Mr. Brieck's personnel file, to your knowledge?

A. Not that I'm aware of.

Q. Was this a—in terms of constructive criticism, or was it—what was the nature of the conversation between yourself and Mr. Jamison and Mr. Brieck?

A. I think it was on amiable terms and just the caution of being more careful in the future.

Q. Do you recall any other problem with Mr. Brieck's work performance during the time that you were with the company? Did any other problem ever come to your attention during the time that you were with Haribson-Walker and that Mr. Brieck was with Harbison-Walker?

A. Not to my personal attention. Of course, I was only Gene's supervisor since taking over as General

Products Manager in the fall of 1979, so I'm not familiar with whatever transpired prior to that time.

Q. Since the fall of 1979, you're not aware of anything else?

A. Not specifically problems in his performance of [11] his duties.

Q. Did Mr. Jamison report any problems to you at any time from the fall of 1979, until Mr. Brieck's termination?

A. Not that I'm aware of. Not that I recall.

* * * *

Q. Did you have any input into the evaluation of Mr. Brieck's work performance, Mr. Sheatsley?

A. Yes.

Q. What was that input?

A. It was a yearly evaluation of basically his job performance which would have become part of his official personnel records.

Q. What role did you play? Were you just a reviewing supervisor and Mr. Jamison did the actual reviewing, or did you do the reviews?

A. I think we collaborated.

Q. You and Mr. Jamison?

A. Correct.

Q. Do you recall what Mr. Brieck's evaluations were at any time from when you became General Products Manager until his separation from [12] employment?

A. I believe they were basically satisfactory ratings. There may have been a fair to satisfactory rating in that time span.

Q. Were there any evaluations that noted any poor work performance on the part of Mr. Brieck? Was there just an overall numerical rating?

A. Basically that's correct. In other words, there were no forms that had to be filled out, if that's what you mean.

Q. Right. What factors went into the rating of Mr. Brieck?

A. Our personal evaluations of the work that he was carrying out on the various assignments that he was given as well as reflecting the comments and so forth of the people in the field. In other words, he served in the field under accounts handled by various salesmen. So we would get feedback from how he performed his task not only directly, but indirectly through the salesmen that covered the accounts that he performed these services.

* * * *

[13] Q. Once an evaluation was completed, how was that evaluation communicated to Mr. Brieck?

A. Basically in that timeframe we had an annual review kind of thing on the anniversary date of the last salary increase. Sometime during that month we would have passed along our comments to Gene at the time that we reviewed any salary increase; merit of salary increase.

Q. Do you recall specifically having any discussions with Mr. Brieck about his evaluations?

MR. HOLLIHAN: For what period of time?

MR. LOGAN: This is from 1979, to 1982. From the fall of 1979, when Mr. Sheatsley became the General Products Manager at the Iron & Steel Market until [14] July 1982, when Mr. Brieck was separated from employment.

A. I can't recall any specific direct conversations with Gene. That would have been most likely handled by Don Jamison, his immediate supervisor.

* * * *

[15] A. What was your personal opinion of Mr. Brieck's reliability in terms of if he was given a task to carry out whether he could do it efficiently and in a timely fashion?

A. Generally satisfactory. In other words, I would expect that he would carry out his assignment as given to him.

Q. Was Mr. Brieck sent on Overseas' assignments from time to time?

A. Yes.

[16] Q. Were other individuals sent on Overseas' assignments, or was it most likely Mr. Brieck who would be doing that in terms of the Installation Specialists in the Iron & Steel Market?

A. I'll say I'm aware that others were sent on installation assignments Overseas besides Mr. Brieck. Specifically who and when, I'd have to go back and check.

Q. If you had an Overseas' installation to perform, was Mr. Brieck the one you would normally rely on to do the job; to make sure the job got done?

A. I wouldn't say normally. He would be one of a group that we could have chosen for that kind of assignment.

* * * *

[17] Q. In July 1982, Mr. Brieck was separated from employment. Could you describe the circumstances surrounding that for me?

A. Okay. Immediately preceding that time period; in April, as I recall, of 1982, the company identified the fact that business conditions were or had been deteriorating and that they were offering eligible employees early retirement. The reason why I'm firsthand conscious of that is because a couple of members in my department opted to take that offer in April and that became effective, as I recall, the end of May as far as the early retirement date.

Q. Do you recall who those individuals were?

A. There were two individuals in my department; [18] Jack O'Reilly and Nick Napora. And then subsequently in approximately the middle of June, my immediate superior asked me orally to identify individuals for consideration of temporary furlough due to the severe depressed business conditions that we were experiencing and our shipment activity had greatly fallen off and the immediate outlook was not one indicating improvement

and, therefore, we were going to have to do something to cut our costs and that one of those actions would be to temporarily furlough some employees. So he asked me, as I recall, to identify six individuals from my department for consideration of temporary furlough.

Q. Did you do that?

A. Yes, I did.

Q. Who were those individuals that were identified?

A. Mr. Brieck, of course; Miss Maus.

Q. Could you give their first names, also.

A. Cindy Maus.

Q. What was her title?

A. I'm not certain. I just don't remember off the [19] top of my head. Do you want me to go on?

Q. Yes, please.

A. Mr. Gerry Dodds.

Q. What was his job position?

A. I believe he was a Market Analyst or a Product Analyst. J.J. Schwerer. I believe he was a Product Analyst. I'm not positive about all these job titles in 1982.

Q. That's okay.

A. W.E. Meixell, Installation Specialist; D. L. Smith, Products Specialist. I believe that adds up to six.

Q. Yes, it does add up to six.

Was there a Mr. Malarich, also?

A. Not at that timeframe in June. That came subsequently.

Q. What did you do when you identified those six people? What did you do with that information? Did you take it to your superior?

A. Yes. I had an oral request from my superior and I responded to that oral request identifying these six individuals as possible candidates for consideration of temporary furlough.

[20] Q. How did you base your decision to recommend those six people for temporary furlough?

A. Well, as I explained a moment ago, the very depressed business conditions resulted in a great fall-off

in our shipments of refractory products to our customers. As I recall, the steel operating rate, for example, had fallen to under 50 percent of rated capacity and in a similar fashion our shipments had fallen at or below that kind of level. Since our products were not being bought and used via customers, obviously we had less need for installation service, so that was one consideration.

If we were not shipping our products, obviously they were not being installed in their normal level and, consequently, we had less need for installation of service people. So that was one of the first areas where, let's say, need had declined; support need.

Q. What were some other considerations?

A. Also the general activity in some of the business segments in a similar fashion had declined, so those areas which were, let's say, most depressed [21] were again less in need of people to support that effort; marketing and technical support effort. So it was basically a relatively simple matter of deciding where our needs were reduced and cutting back of personnel accordingly.

Q. Were there any other considerations than the two you've mentioned; number one, that there was less need for installation services and, number two, that there was less need for marketing support and technical support in certain of the business areas?

A. That was basically it. Just reduce need for service support.

* * * *

Q. In terms of the individuals who were recommended as candidates or who were identified as candidates [22] for temporary furlough in terms of the installation service people, how was it decided that Mr. Brieck and Mr. Meixell would be recommended as candidates for temporary furlough?

A. Well, first of all, they were two of—you mentioned Meixell and Brieck?

Q. Yes.

A. They were two of four Installation Specialists at the time, so since assistance in the installation of our refractories was definitely less needed, that was a prime consideration for those two individuals, first of all.

Q. Why those two rather than the other two Installtion Specialists?

A. Well, combination of factors. Number one, Mr. Meixell was of relatively recent hire, as I believe. He came with us in 1980, and, therefore, was one of the less senior installation specialists of the group. Then the other three, as I recall, were about of the same service base timewise with the company; that is, Mr. Brieck and Mr. Malarich and Mr. Faust; about the same [23] years service with Harbison.

Q. How did you decided between Mr. Brieck and Mr. Malarich and Mr. Faust?

A. It was judged that between Mr. Malarich and Mr. Brieck Mr. Malarich was more versatile, had a broader experience base in all the application areas to which we had to provide service in the Iron & Steel Market and was judged to be slightly more capable than Mr. Brieck on a past performance basis. Mr. Faust had the capability of a multi-functional capability because he had initially experience in the area of administration and sales correspondence and the area, a market segment area that he was working under which was Iron Production involved what we call quite a bit of project bidding and he could support the Product Manager in analyzing and putting these project bids together in preparation for a quotation, so that was still a needed requirement in that area at the time.

Q. Was there any consideration given to Mr. Brieck being able to perform that project bidding function [24] that you felt Mr. Faust could perform?

A. There wasn't any firsthand consideration given. In the total evaluation, it was recognized that he did not have those developed skills that Mr. Faust had in that area.

Q. How did Mr. Faust develop those skills?

A. Initially as I had said he had initially worked in the Administration Department as a Sales Correspondent.

Q. That was how long prior to 1982?

A. I believe that's where he started with the company and [was] there for some years. I don't remember exactly when he was transferred to our department from administration.

Q. How long had he been an Installation Specialist?

A. For several years. I don't remember exactly.

Q. Was any consideration given to the salary of the four Installation Specialists in—

A. I don't even believe I was aware at the time of—I didn't even look up their salary at the time this was being considered.

Q. When you were asked by your superior to identify six people, was there given any thought to—I [25] assume it was for cost cutting reasons? When you were asked to identify the six people, the whole purpose was to cut costs?

A. Well, it was explained to me, as I previously stated, that due to a severely depressed business condition where our business had fallen off significantly and we were running considerably below plan that, yes, we would have to—the company would have to cut costs.

Q. Were you given a certain monetary figure in looking at someone's salary and benefit package—

A. No.

Q. —and to total up six people or a number of people that would approximate a certain amount you were expected to cut in terms of cost?

A. No. My superior only advised me as far as a guideline was concerned that it should be guided by what our current needs and their future needs were for providing service and support to the field. So no costs or targets or anything of that nature were identified.

Q. After you made your recommendation—I assume you—after you identified those six individuals, [26] what

did you do with that information? Did you take it to Mr. Sekeras?

A. Yes.

Q. Can you recall the discussion with him?

A. There wasn't too much discussion, as I recall. There was just some general review of the names that I had orally submitted, and I don't believe there was a need really in that case for a lot of discussion because Mr. Sekeras was firsthand familiar with our department, the personnel in our department since he was a department head of the same department prior to my appointment. In other words, he immediately preceded me as General Products Manager of Iron & Steel Market, so he was firsthand familiar with the operation of the department and the personnel in the department and our overall business situation at the time.

Q. Did you have a discussion with Mr. Jamison either before you went to Mr. Sekeras in helping you to identify these six candidates for temporary furlough or when you met with Mr. Sekeras? Was Mr. Jamison a part of that [27] process?

A. No, he was not.

Q. Did you seek any input whatsoever from Mr. Jamison as to which of the four Installation Specialists should be retained and which should be recommended for temporary furlough?

A. No, I did not.

Q. How long after you identified the six people was the notification made to the individuals?

A. Approximately within a couple weeks. As I recall, the original request was made around the middle of the month of June and the first temporary furlough was issued on July 2nd.

Q. Can you describe for me the means by which the temporary furlough of Mr. Brieck was communicated to him?

A. It was handled personally by myself and Mr. Jamison with Mr. Brieck.

Q. Can you describe what took place?

A. Gene was called into my office and it was explained that simply due to severe fall-off in our business and generally very depressed marketplace condition that it was necessary to [28] advise some people that they were going to be placed on temporary furlough and that he was one of these individuals that unfortunately had to be notified of this action. I explained to Gene at the time that it was nothing personal or anything about him. It was just a matter of business conditions being beyond our control and that he was not being singled out as an individual in this action; that there were numerous other marketing people that were similarly affected. I did not identify who those people were or what was going to happen when because I did not know myself the individuals specifically involved.

Q. What did Mr. Jamison say during this meeting, if you can recall, or what did Mr. Brieck say, also?

A. I honestly don't remember any specific points that either party mentioned. I know Gene was very upset and basically I think—as I recall—the expression of understanding as far as Harbison's need for this action, but I don't remember any specific statements, comments or [29] points that were called out.

Q. Did he ask you why he was selected and not one of the other Installation Specialists?

A. He may have. I don't specifically remember whether he did or not.

Q. Do you recall saying anyting [sic] to him about why he and Mr. Meixell were selected for temporary furlough and not Mr. Malarich and Mr. Faust?

A. No. I don't believe I recall identifying that action.

Q. What was the scope of the temporary furlough as you saw it in June and July of 1982? How long did you think it would last or how long did your superior, Mr. Sekeras, think it would last?

A. They didn't identify for us any timeframe. All we had was some guidelines that we were asked to cover

to the people that we were furloughing, and these guidelines I think were generated by our IR Department and there wasn't any statement by either my superior or these guidelines as to the timeframe that this temporary furlough would be applicable to.

[30] Q. The IR Department is what?

A. Industrial Relations Department.

Q. There was still a need for Installation Specialist work in July of 1982, I assume. Someone still had to perform the Installation Specialist function?

A. Yes. Only at a greatly reduced level as compared to prior experience.

Q. Who performed the Installation Specialist function after July 2, 1982?

A. Well, of course, we still had two remaining Installation Specialists and the remainder had to be handled by the Products Specialist/Product Analysts Group. So it was simply spread among the remaining members of the department in a sense.

Q. So that the two remaining Installation Specialists performed that Installation Specialist function as well as some of the other individuals still in your department?

A. That's correct.

Q. Who were the other people that helped with the Installation Specialist function?

[31] A. That would have been essentially the total body from time to time of the remaining members of the department.

Q. Do you know who actually did that? I assume that there were people that had no prior experience in Installation Specialist work that couldn't do that?

A. No. That's not true. Essentially all of the other members of the department also had the capability if called upon to handle installation work. That was not their prime task or prime responsibility, however. They had other prime responsibilities other than installation; whereas, the Installation Specialists' prime responsibility was, in fact, heating [sic] in the installation of our products. Is that self-explanatory now?

Q. How many other members of your department were there after July 2, 1982; after this first temporary furlough?

A. After the first six?

Q. Yes.

A. 32. A total number of the department including [32] clerical would have been 32.

Q. Of those 32 that remained after the temporary furlough of the first 6, how many of those 32 actually, in fact, helped in doing Installation Specialist work in the months after then?

A. I wouldn't be able to say specifically, but the majority or nearly all or perhaps all of the remaining non-clerical personnel with the possible exception of Don Jamison and myself. So the various Product Managers, the various Product Specialists and Product Analysts would have all contributed in this installation service area.

Q. They would actually go on the job site?

A. Correct.

Q. What was the need then to have a special job description entitled Installation Specialist or Senior Installation Specialist if anybody could do the function?

A. Not anybody. Those who had the capability to perform that work. The Product Manager is obviously more concerned with many other things than installation work. As I said, that was not [33] their prime assignment. It would be way down on the list of responsibilities. Same fashion with Products Specialists. Installation service work was not one of their prime tasks. However, as business conditions continued to deteriorate, an individual within the department had to double up on his duties not by choice, but by the conditions at hand.

Q. Prior to identifying the first six people for temporary furlough, was there any consideration given to, perhaps, having Mr. Brieck do some other work that was elsewhere in the department that still had to be done and to lay-off someone else that maybe didn't have the experience in the range he had in Installation Specialist

work? Did you give any consideration to, perhaps, retraining Mr. Brieck or to putting him in another position to see if he could carry out some other function?

A. There was no serious consideration of putting Mr. Brieck into a Products Specialist role, for example—is that what you're indicating?

Q. Right.

[34] A. —because he would not have had the capability to do that at the time and with the reduction in personnel, we were not in a position to put somebody into a training program to learn another kind of job. It would also require in the case of a Product Specialist or a Product Manager's job a certain development of technical skills as well as installation skills so that, as I say, the prime tasks in these areas were of a different nature than just installation work.

Q. What kind of technical skills?

A. Well, the Product Specialist, for example, first of all, is responsible for the marketing concept in their application area as well as the refractory engineering aspects of the application and the products used in those application areas. So the majority of our Product Specialists are either graduate engineers or technically trained people. So they have—in addition to carrying out the marketing concepts, they also have the responsibility to properly apply our products, understanding how our products are best used in [35] the application, troubleshoot and problem solve from an engineering sense, again, in the individual refractory application areas.

Q. I understand that there were subsequent furloughs after these initial six people were put on temporary furlough; is that correct?

A. That is correct.

Q. When did the next round of furloughs take place?

A. Okay. Mr. Sekeras came to me again in the latter part of July; mid to latter part of July advising that business conditions were continuing to deteriorate and that we would need to again consider some additional

temporary furloughs and, as I best recall, he asked for at least two additional candidates for consideration of placing on temporary furlough. At that time, I submitted, as I recall, two additional names.

Q. They were?

A. Mr. Malarich and Mr. Heath.

Q. What were their first names?

A. Albert Malarich and Dennis Heath.

Q. What were the job positions of each?

A. Mr. Malarich was an Installation Specialist and [36] Mr. Heath was a Staff Correspondent.

Q. What were your considerations in identifying these two individuals for furlough rather than the other people that remained in the department?

A. Okay. Somewhat similar fashion to the first round. With the continued declining of our shipments, again less and less installation service was being required, so that was one—the primary consideration, let's say, for furloughing Mr. Malarich. . . .

* * * *

Q. Were there subsequent furloughs after these two individuals were furloughed?

[37] A. Yes.

Q. When did those take place; the next round?

A. I believe that occurred in November of 1982, and, once again, my superior came to me to advise that further deterioration of our level of business was occurring, and that we were going to find it necessary to furlough additional people. As I best recall, he orally asked me for names of about four individuals; four additional individuals for consideration of furlough.

Q. Who was selected?

A. Mr. Faust. . . . Hugh. Mr. David Westphal, Mr. Douglas Wright and Mr. Glenn Shortman.

Q. The job positions of each?

A. Mr. Faust was an Installation Specialist. Mr. Westphal was, as I recall, a Product Analyst—well, Mr. Westphal and Mr. Wright and Mr. Shortman I believe were all Product Analysts.

Q. Were any of those individuals subsequently [38] re-hired or brought back to work; any of these four?

A. Three of the four were subsequently re-hired or brought back.

Q. Were they re-hired, or were they recalled?

A. Combination of both.

Q. Can you describe for me what Mr. Faust's situation was when he was brought back? Was he re-hired, or was he recalled?

A. I'm not positive, but I believe he was recalled. I'd have to confirm that with my personnel records, but I believe he was recalled.

Q. Do you know when he was recalled?

A. I'm going to say as I can best remember middle of 1983, mid 1983.

Q. What were the circumstances necessitating his recall?

A. Business conditions were beginning to improve slightly from the low point at the end of 1982, and early 1983, and we could justify some additional help in the department to cover some of the increased activity in installation servicing.

[39] Q. Was there any consideration given to recalling or re-hiring Mr. Meixell, Mr. Brieck or Mr. Malarich rather than Mr. Faust in mid 1983?

A. Not at that time, no.

Q. What was your understanding of the terms under which Mr. Brieck was separated from employment in July of 1982? We had talked about it being a temporary furlough. How long was that furlough to have existed?

A. The guidelines that I covered at the time was nine months. If not called back within nine months, the furlough would become permanent.

Q. Was that the same for the second round of furloughs that took place in late July of 1982? Was it also—

A. I believe so.

Q. And in November of 1982, was it also a nine-month period?

A. I'm not positive. I don't remember specifically whether the same timeframe applied or not.

* * * *

[41] Were there ever any individuals who were hired back or hired as new hires following nine months after the beginning of the temporary furlough period?

A. I believe Mr. Westphal in that case, for example, was re-hired after the nine month period.

* * * *

[42] Q. In the period following July 2, 1982, until the present, have there been any Installation Specialists who have been hired by Harbison-Walker in the Iron & Steel Group?

A. Since 1982?

Q. Yes. Since July 1982.

A. Yes. There's been one individual who has been hired, newly-hired into the Iron & Steel.

[43] Q. What was that person's name?

A. O. H. Strom.

Q. Is that Otto Strom?

A. Correct.

Q. When was he hired?

A. Middle of 1984.

Q. He was hired into what position?

A. Installation Specialist or Senior Installation Specialist. I don't remember exactly the title.

Q. Do you recall how he was hired? . . .

* * * *

A. Well, it's a complex series of events. Bethlehem Steel Sparrows Point was a very important account for us and, as I say, a series of events led up to this particular action of hiring Mr. Strom. We had been suffering market share loss at Bethlehem Steel Sparrows Point. Coupled with that, our salesman who was calling on that [44] account resigned and also concurrently Mr. Strom

was an employee of Bethlehem Sparrows Point with 30 plus years service with that company at that location specializing in the area of masonry work supervision as well as other project engineering supervision activities.

He was eligible, as I understand it, for early retirement from Bethlehem Steel Sparrows Point and we had to assign a new salesperson to that account and we were desirous of improving our situation market sharewise, our participation with Bethlehem Steel Sparrows Point and so a combination of these events resulted in our being interested in hiring Mr. Strom to assist us in our task of gaining greater participation in the business of Bethlehem Steel Sparrows Point, so, therefore, he was brought on board to laregely [sic] assist in this effort. He remains a resident of the Baltimore area and spends most of his time working directly with our salesperson in satisfying our requirements at Bethlehem Sparrows Point. So that was—

Q. Roughly how old is Mr. Strom?

[45] Q. His mid fifties, I think. He was 55 when we hired him about a year ago, so he's either 55 or going on 56. . . .

* * * *

Q. Was there any consideration given to re-hiring Mr. Brieck for that position that was filled by Mr. Strom in mid 1984?

A. No, there was not.

* * * *

[54] Q. Was there any other person in the Iron & Steel Group that was transferred to another department of Harbison-Walker?

A. Not that I recall.

Q. Did you ever hear any comments from or receive any letters or documents from various customers of Harbison-Walker praising Mr. Brieck or thanking him for good work that he had done?

A. Yes. I would be aware of some thank you notes from probably a couple of customers or more on Mr. Brieck's behalf.

[55] Q. Did you ever hear any negative comments about Mr. Brieck's work performance other than concerning this earlier incident with Wheeling-Pittsburgh Steel?

A. Did I hear of any comments?

Q. Yes.

A. Negative comments?

Q. Did you hear yourself of any other incidents than the Wheeling-Pittsburgh Steel incident that you testified about at the beginning of this deposition?

A. I have to say that I recall some negative comments being made, but I cannot specify or identify what time-frame, what reference they would pertain to at this time.

Q. Did those comments play any role whatsoever in the decision to select Mr. Brieck as one of the candidates for the temporary furlough?

A. Not directly.

Q. Did it indirectly play any role whatsoever?

A. Those specific comments?

Q. Any comments about negative work performance or—

A. Well, that would have been, let's say, a part of [56] one's judgment of evaluation of his past performance. That's all.

Q. Did you do any formal written ranking of the four Installation Specialists to see which of them would be laid off as part of the first six to be laid off?

A. Do you want to repeat that question?

Q. Did you do any formal ranking of the four individuals; for example, in writing? Did you have certain—

A. No.

Q. —factors and you gave certain points for each factor and weigh the various factors to arrive at which of the four should be part of the first lay-off or the second lay-off?

A. No, we did not.

* * * *

DEPOSITION EXHIBIT 1

INTEROFFICE CORRESPONDENCE

HARBISON-WALKER REFRACTORIES
Division of Dresser Industries, Inc.,
2 Gateway Center, Pittsburgh, Pennsylvania 15222

To:	Date:
See Below	July 8, 1982
From:	Refer:
W.G. Sekeras	
Subject:	cc:
Iron & Steel Market	L.L. Sheatsley
Impact of Furloughs	Noted 7/19 L.L. Sheatsley

To:

T.C. Joyce—Region 11
J.S. Henderson—Region 13
R.B. Armstrong—Region 15
C.E. Lawhon—Region 15, St. Louis
W.K. Brown, Region 15, Houston
H.C. Willenbrock—Region 16
W.T. Engelbrink—N/A 17
W.D. Meloy—N/A 18
E.W. Koenig—N/A 19
M.E. Cole—N/A 20
K.W. Hansen—N/A 21
G.H. Shrewsbury—Region 22

By the time you receive this letter you will have learned of another 10% cutback in salary personnel throughout Harbison which became effective on July 9. The impact on Iron & Steel as a result of the early retirements, the first reductions and now the second reductions means we have lost, temporarily, approximately 20% of our organi-

zation. In addition, our warehouse forces have been reduced and our office staffs are at the bare bone.

The heaviest impact in the second reduction was in our Marketing Support Group which will seriously reduce our capability from Pittsburgh to follow installations.

It should be obvious to each of you that considerable thought was given prior to any decisions on furloughs and the fact that we again lost well over $3 MM in June contributed to the decisions. With this reduction in forces, there will be considerable overlapping of job responsibilities and I am counting on each of you to pull your teams together to fully accomplish maximum sales under these conditions. Sales people will be required to do service work in the warehouses as needed, answer telephones as required, and follow installations as required. All of us will undoubtedly be working more hours than we have in the past because we will do the job.

I also expect each of you to take additional roles and responsibilities to help fill the gaps as we make every effort to accomplish the sales. This means you may be required to make personal sales calls, even follow installations or whatever is required.

These obviously are not the best of times for the total U.S. economy and, therefore unprecedented actions had to be taken. We do not know when those furloughed will be called back, it all depends on the U.S. economy and our steel industry. You can be assured our Management is as anxious as you to have our full team back in place.

Since we will be asking everyone to work harder as a result of our deductions [sic] it is obvious that we cannot accept anybody who is reluctant to do their share. Therefore, if any of your people do not feel they want to participate on the remaining team with a heavier burden, then please let me know and we will accommodate them.

We will continue our budget restrictions including no dinner and golf entertainment. I have also instructed Larry Sheatsley and his department that we must give very careful consideration to all travel and also car rentals will be kept to an absolute minimum even during installation jobs that are approved. Although this news is not cheery, I think all of you recognize the need for these actions. We have a very strong organization remaining with our best people in the right positions and I am more confident than ever that with the relationships you fellows have developed with your customers that we can maintain market share even with these reductions.

For your information, the steel industries projections for July, August and September are pretty bleak, but come October in the eyes of our customers are good signs appearing for our economy, and steel production should start picking up. When that happens brick will be required in a hurry and we may even have some fun.

WGS/baq

EXCERPTS FROM THE DEPOSITION OF DONALD JAMISON

(Record 235a-246a)

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[4] Q. . . . [D]id you have occasion to supervise the Plaintiff in this lawsuit, Eugene Brieck?

A. He reported to me.

Q. For how long a period of time did Mr. Brieck report to you?

A. I can't really—I'll say probably from like 1975-1976, until he was laid off.

Q. What was your opinion of Mr. Brieck's work performance in the period of time that he reported to you?

A. I always rated him as an average performer; adequate for the Installation Specialist work that he did.

Q. In the rating system that was applicable at Harbison-Walker, there were five different rating numbers, as I understand it, from one to five. How would he normally be rated by you? A three?

A. A three, yes, for incentive purposes.

Q. That stood for what? Fully satisfactory?

A. Satisfactory, average; uh huh.

Q. Were there any Installation Specialists who rated higher than Mr. Brieck?

[5] A. That I supervised?

Q. Yes.

A. I typically rated Al Malarich higher.

Q. What was Mr. Malarich's rating?

A. Usually a four; three and a half to four.

Q. Was there anyone that rated lower than Mr. Brieck?

A. At one time we had a Joe Scott who was an Installation man and he ranked at the same level or slightly lower. He retired.

Q. In 1982, there were I believe four Installation Specialists within the Iron & Steel Market; is that correct?

A. Yes.

Q. There was Mr. Brieck, Mr. Malarich, Mr. Meixell and Mr. Faust; is that right?

A. Yes. Meixell did not report to me.

* * * *

[6] Q. What did Mr. Meixell do?

A. Well, he worked on bills of material, engineering and to some degree a little bit of pricing, material choice in some instances.

Q. Didn't all of your Installation Specialists do some of that?

A. No.

* * * *

[7] Q. Mr. Jamison, when Mr. Brieck was laid off in July of 1982, did you have any discussions with Mr. Sheatsley or anyone else in the decision to—or did you have any input in the decision to—

A. No.

Q. —lay Mr. Brieck off?

A. No.

Q. Was your input sought by Mr. Sheatsley or by anyone else as to which of the four—

A. No.

Q. —Installation Specialists should be furloughed?

A. No.

* * * *

[8] Q. When did you first hear, Mr. Jamison, of any lay-off that was going to take place in the Iron & Steel Market?

A. The day that Gene was laid off.

Q. What did you hear?

A. Just that there were going to be lay-offs.

Q. You had not heard anything about this previously from Mr. Sheatsley?

A. No. Rumors, of course, are prevalent in a large company. Maybe not in law firms, but in large companies.

Q. Had you had any discussion prior to July of 1982, with Mr. Brieck about the possibility of his being laid off?

A. No.

[9] Q. Do you recall any discussion with Mr. Brieck maybe in the period of a year or two before then when he asked whether he might be laid off?

A. I believe that when we had a luncheon for his 15th anniversary he asked about that and I think Mr. Sheatsley and I said there were no plans at that point in time for lay-offs.

Q. Do you recall Mr. Brieck expressing any—whether he expressed any concern about being laid off in that luncheon?

A. I think he just asked what his status was. Business by that time had slowed down from our prior level of activities that he was typically used to.

Q. Do you recall who said what? Did Mr. Sheatsley say that there were no plans for lay-offs or did you say that or did you both say it?

A. Probably Mr. Sheatsley.

Q. Were there any comments made of a more affirmative nature than that in terms of reassuring Mr. Brieck that he would not be laid off?

A. Not that I recall.

* * * *

[11] Q. Can you describe that meeting [at which Mr. Brieck was laid off]; who said what, where it took place and so forth?

A. In Larry Sheatsley's office and I believe Larry did most of the talking and told Gene that because of business conditions he was going to be furloughed and explained the details of what rights he retained as far as medical and the time of which his separation would become permanent if he was not called back and so forth and that's all I really recall, and Gene kind of said he thought it was coming or thought it might be coming or something like that. That's all I really recall of the meeting.

Q. Do you recall whether there was any mention made of plans for the future in terms of his being recalled or re-hired?

A. Only that he would be called back as business conditions dictated; entirely based upon business. [12] That's why he was being laid off.

* * * *

Q. . . . There was a subsequent lay-off when Mr. Malarich was laid off?

A. Uh huh.

Q. Was there any discussion you were aware of as to whether Mr. Faust or Mr. Malarich should be laid off; between the two of them, who should go first?

A. Not that I was involved with.

[13] Q. Mr. Sheatsley did not seek your input and you didn't give any input into who should be recommended for that second furlough?

A. None.

Q. Subsequently business picked up; that is, subsequent to July of 1982, and there was a need to recall or re-hire various of the Installation Specialists that had been laid off and I believe Mr. Sheatsley testified that Mr. Faust was brought back.

Do you recall the circumstances under which Mr. Faust was brought back?

A. I believe he was brought back when Al Malarich retired.

Q. Maybe you can describe for me—the people underneath your supervision, can you describe which of the Installation Specialists were laid off when?

A. I believe Gene was laid off first and then Al Malarich and then Faust, as I recall.

Q. And you say Mr. Faust was brought back when Al Malarich retired?

A. Yes.

[14] Q. Had Mr. Malarich been brought back?

A. Yes, he was brought back.

Q. When was Mr. Malarich brought back?

A. In early—sometime in 1983, to do a special job; just a temporary.

Q. What was that job?

A. I believe it was to install a degasser lining at Mack Steel up in Michigan. That's my recollection.

Q. How long did that job take?

A. Oh, that took—it was a pretty complicated thing. It probably took two months or something like that.

Q. This would have been sometime in 1983?

A. Yes. In the spring or—late spring we'll call it; May, maybe; something like that.

Q. Had Mr. Malarich been brought back as a full-time employee?

A. No. It started as a temporary.

Q. You say it started as a temporary?

A. Yes.

Q. Was he converted in—

A. Well, he was laid off again after that job was [15] finished for a period of time. I don't recall how long; maybe a month or so. By that time, business had picked up a bit and he came back as a permanent employee and thus was eligible for the retirement offer that was made in the fall of 1983, at which he took.

Q. Is that when Mr. Faust was brought back?

A. I think that is when he was brought back; around that time.

Q. He was brought back after Mr. Malarich retired?

A. Announced his intention to retire, yes.

Q. Was there a period of time from when he announced his intention to retire and when he actually retired, or was it a rather short—

A. It was a very short period of time.

Q. Matter of days or a week or how long?

A. That's about it, yes. He only had a couple weeks to choose.

Q. Do you know was there any consideration given to bringing Mr. Brieck back rather than Mr. Malarich to do that special job in early 1983?

A. No, because Al Malarich had much more experience [16] in this type of installation as opposed to Gene.

Q. What about when the business had picked up and Mr. Malarich was brought back as a permanent employee? This would be some time in 1983.

A. No, there wasn't any consideration.

Q. Why not?

A. Again, because generally Al Malarich was considered to be a better Installation man; more versatile, better accepted by—particularly by field personnel.

Q. When Mr. Faust was brought back after Al Malarich announced his intention to retire, was Mr. Faust brought back as a full-time permanent employee?

A. Yes.

Q. Were you consulted about bringing Mr. Faust back?

A. No.

Q. Did you plan any part whatsoever in the decision to bring Mr. Faust back?

A. No.

Q. Who made that decision?

[17] A. I guess Mr. Sheatsley.

Q. Do you know was any consideration given to bringing Mr. Brieck back rather than Mr. Faust?

A. Not that I know of.

* * * *

[25] Q. Have you ever had any customer complain about any deficiency in Mr. Brieck's work performance; any complaint that was of a serious nature?

[26] A. Only insofar as some of our field sales people were not totally satisfied always with Gene's attention to detail and performance on the job.

Q. When were those comments made to you?

A. At various times.

Q. Is there any documentation for any of those things; any indication in his personnel file that you're aware of?

A. Well, there was the incident at Wheeling-Pittsburgh Steel very near the end of his employment.

Q. Could you describe that incident for us?

A. Well, through maybe a communication problem or something he left a job before completion of a BOF lining; an area that was considered very critical in construction and detail by the customer.

* * * *

[27] Q. Do you know was this incident concerning the Wheeling-Pittsburgh Steel job—did it play any [28] part whatsoever in the decision to lay Mr. Brieck off in July 1982?

A. Not as far as I know.

* * * *

Q. How would you rate Mr. Brieck's performance overall? I think you said earlier it was—

[29] A. Average.

Q. —average.

A. Adequate in the job that he was hired to do.

* * * *

EXCERPTS FROM THE DEPOSITION OF JOHN M. NICOLELLA

(Record 248a-297a)

* * * *

[4] Q. What is your occupation?

A. I'm the manager of employee relations for [5] Harbison-Walker.

Q. How long have you held that position?

A. I've held that position since the mid '70s. I actually took the position as manager of personnel in 1982, which essentially is the same job.

* * * *

[8] Q. . . . Let's say in the period 1982, how many employees were involved in—were covered by the duties that you were engaged in?

A. Within the industrial relations department and my employee relations department, I would say there were four of us in 1982.

Q. Your work touched how many employees of Harbison-Walker?

A. In what year?

Q. In 1982. In early 1982, roughly before [9] these big layoffs started to take place?

A. The numbers that I compiled before this, it went back to 1980 when the thing started to tail off. In 1980 there were roughly 5000 employees, which included international operations and Canadian operations. Of those 5000, there were 1450 salaried people, which those people are mainly the ones that I touch upon with the salaried administration.

Q. And in the period leading up to July of 1982, let's say in early 1982, how many employees were there then within Harbison-Walker?

A. Roughly 3,000.

Q. Was the attrition due to a layoff or—I'm sure it was. When did the attrition start to take place and what were the reasons for it?

A. The attrition started to take place in mid 1980.

Q. Can you explain the circumstances?

A. Mainly the lack of business in the steel industry, which we supply most of our products to.

Q. Can you describe the process that began in 1980 in terms of how you would select employees for furlough or for early retirement, however you would effectuate the reduction in force?

[10] A. When the word would come out that we would have to cut back in capacity costs, specifically in numbers of people, laying off of hourly people is strictly done by seniority by each individual plant and we don't get involved in that.

As far as salaried people go, the word would go out to the department heads, and I'm talking vice presidents would be the department heads, that they would have to cut back to a certain figure. They would then decide on who they could best do without under a reduced work force. They would compile a list of names and submit the names to me—to our department. I would then review the list and anyone that had more than 15 years of seniority with our company would have to be referred to Dallas for their approval.

Once we agreed, once industrial relations agreed with the people that should be laid off, the word went back to the department and those people were laid off.

Q. Was your role just to see whether people had over 15 years of employment?

A. My role was basically to look into each individual case for EEO purposes—equal opportunity employment purposes and just to— [11] specifically look at people below 15 years and also the ones above 15 years. I would compile the report for above 15 years and send that to Dallas. I would essentially do for 15 years and below what

Dallas would do for 15 years and above. Dallas I'm talking the corporate headquarters.

* * * *

[13] Q. I see on page 1 of the document entitled "Layoff and Termination Approval-Salaried Employees" that it was issued June 29, 1982, and it indicates under the policy section in subparagraph No. 2, "All Dresser locations must obtain prior Corporate approval of the involuntary termination of any salaried employee having 15 or more years of service." Is that correct?

A. Yes, it is.

Q. That was the unwritten rule in effect prior to June 29, 1982 also?

A. That's correct.

[14] Q. Was Mr. Brieck one of those people that was covered by that policy as of July 1982?

A. Yes, he was.

Q. Was his furlough approved by Dallas?

A. Yes, it was.

* * * *

[15] Q. Mr. Nicolella, I'm going to show you a document that is a copy of the complaint filed by Mr. Brieck in his action pending before U.S. District Court for Western District of Pennsylvania and refer you to paragraph 15. . . .

* * * *

[16] Q. Would that statement attributed to Senior Vice President [Ytterberg] in the Dresser Industries company newspaper entitled *Dresser News* in the Spring 1982 edition of that newspaper, would that statement be part of the unwritten rules that were in effect prior to the June 29, 1982 document that you have identified as part of Nicolella Deposition Exhibit No. 1?

A. Yes, it would.

Q. I'm going to show you a document that I'll mark as Deposition Exhibit No. [2] . . . which is the spring 1982 edition of the Dresser news publication and call your attention to the article entitled, "Some Plants

Forced to Make Employee Layoffs", and ask you to take a look at pages 1 and 2 of that document.

* * * *

[17] Q. Would this Deposition Exhibit No. 2 also be part of the unwritten rules that existed in the spring of 1982?

A. Yes, it would be.

Q. It would also have been part of the rules that were in effect when the furlough of Mr. Brieck took place in July of 1982?

A. That's correct.

* * * *

[19] Q. Did you have a discussion with either Mr. Sheatsley or Mr. Jamison prior to Mr. Brieck's layoff in July of 1982?

A. No, I did not.

Q. Did you have a discussion with any individual in supervision—in the line of supervision or over Mr. Brieck prior to July of 1982 about whether he would be a candidate for furlough?

A. Yes, I did.

Q. Who was that?

A. William Sekeras.

Q. Who is Mr. Sekeras?

A. I'm not sure if his title at the time—he's presently the vice president of marketing.

Q. Do you recall what your discussion was with Mr. Sekeras regarding Mr. Brieck?

A. Specifically I don't recall discussing Mr. Brieck. We just talked about all the people in general.

Q. What role did you or any person in your department play in selecting the individuals for furlough, if you did play a role in selecting those individuals for furlough?

[20] A. I did not play a role in selecting individuals for furlough.

Q. Prior to say an employee with over 15 years of employment with Dresser Industries having their imminent furlough being approved by Dallas, was it first screened through you and you were asked to make your recommendation as to whether that person appeared to be an appropriate candidate for furlough?

A. Yes.

Q. Do you recall what you would have said about Mr. Brieck prior to information being sent to Dallas concerning the possibility of his being furloughed?

A. I would have said—I would have questioned why the individuals that were being singled out to be laid off would have been laid off. If there were any others that should have been laid off and he should have remained, I would have gone through that process of analyzing the situation of who was leaving and who was staying.

Q. I believe there were four installation specialists in the iron and steel department in July of 1982, that being Mr. Brieck, Hugh Faust, whose deposition we just took today, Mr. Malarich [21] and Mr. Meixsel?

A. I recall those names.

Q. Do you recall why Mr. Faust was kept on and the other three individuals were furloughed in July 1982?

A. Because Mr. Faust was able to perform more functions than the individuals that were laid off. In other words, in a reduced work force, we need people that are flexible, people that can perform more than one function because we are cut back.

Q. Who related to you that Mr. Faust was able to perform more functions?

A. I don't remember exactly, but it would have been somebody from the marketing department. Plus Mr. Faust worked in the administration department before he came into the iron and steel support group.

Q. What difference would that last factor have made?

A. He was able to perform the duties from the marketing administration department.

Q. Such as?
A. Pricing, quoting.
Q. Anything else?
A. That's all I can think of.
[22] Q. In looking at it from an EEO viewpoint, do you recall your having a discussion with any individual regarding the way it might look to someone in an agency that is charged with administering fair employment practices laws if Mr. Faust were kept, he being under age 40, and three individuals over age who were terminated? Do you recall having any discussions with anyone about that?
A. That is the type of discussion that I would have had with a department head.
Q. Do you recall having a specific discussion like that?
A. Specifically, I don't remember this one, but I know I would have questioned that.
Q. Do you recall specifically questioning that even if you can't remember the person you questioned it with? That is, did you in fact question someone about why Mr. Faust was being kept on?
A. Yes, I had to. I had to question that.

* * * *

[23] Q. Do you recall asking anybody whether Mr. Brieck or Mr. Meixsel or Mr. Malarich were trainable in a short period of time to perform the pricing or quoting functions that Mr. Faust was able to perform?
A. I'm sure during the conversation it came up why these three older individuals, and the answer came back and—was they are installation specialists, they are bricklayers. We need somebody that can do more than just supervise the installation of brick in a steel mill. Hugh Faust fit that bill. Even though he was younger, he had more years service, but he could do that job. He had more years service than any of those other individuals.
Q. Any of the three of them?
A. Yes.

Q. Were there any other factors that came into play such as ratings or anything like that in [24] deciding to keep Mr. Faust?
A. Yes, ratings would have come into play, also. Mr. Faust is rated higher than Mr. Brieck.

* * * *

Q. Could you describe, Mr. Nicolella, the rating procedures that was in use for the several years prior to July 1982?
A. The rating procedure was essentially a five category performance rating, the top rating or the highest being outstanding, that's the fifth level. The fourth level would be very good, the third level fully satisfactory, the fourth fair,—I'm mixed up.
Q. Number 2 would be fair and—
A. And number 1 would be unsatisfactory.
Q. Was there any weighting that was done with regard to the various factors used in making the decision to retain Mr. Faust and not the three older individuals? Say if you take three or four different factors, were a certain number of points assigned to each of the factors and a total number of points developed?
A. No, it wasn't that sophisticated.
[25] Q. More of a subjective system that was in use?
A. By the department.
Q. By the department?
A. Yes. By the managers in that department.

* * * *

Q. . . . You or people in your department played an advisory function to the people in the department, though, is that correct?
A. Yes.
Q. You had no personal observation yourself—you had no prior ability to observe the performance of Mr. Faust, Mr. Brieck, Mr. [Meixell] or Mr. Malarich?
A. No, I did not.

Q. Were there any other factors that came [26] into play in the decision to retain Mr. Faust and not the other three individuals—not any of the other three individuals?

A. I'm sure there were other factors, but the main factor was the flexibility of the individuals and performance ratings.

Q. Flexibility of Mr. Faust?

A. Yes.

Q. And performance ratings?

A. Yes.

* * * *

[29] Q. What is the normal practice to be followed by a management-level employee of Harbison-Walker when they notice a defect in the work performance of one of the people they supervise?

A. The advice to the manager is to counsel the individual, to talk to the person. And a lot of times there aren't written records made of those kinds of talks.

Q. In 1982 and in the year or two prior [30] thereto, was it the practice of Harbison-Walker or a policy at least of Harbison-Walker to encourage managers to reduce the oral counsellings to writing in the form of a document to the file or memorandum that would be given to the employee?

A. We had not encouraged them to do that, no.

Q. Have you since changed your policy and do you now have a policy that requires—that encourages managers to document things?

A. We had no written policy that encourages managers to do that.

Q. Is there any unwritten rules regarding that?

A. We constantly remind them to document such incidents, yes.

Q. What form of documentation do you encourage your managers to engage in?

A. Simple write-up of the incident.

Q. Is a copy of the write-up to be given to the employee?

A. No.

Q. This was the practice prior to July 1982 also?

A. Yes.

* * * *

[33] Q. I'm going to show you a document here which I have identified as Nicolella Deposition Exhibit No. 5 and ask if you can identify that?

A. Yes, I can.

Q. What is that?

A. That's a memo from Mr. Shonkwiler to me explaining four individuals that he would like to layoff that had more than 15 years service.

[34] Q. What's the date of that memo?

A. June 17, 1982.

Q. Do you recall what you did with that memo when you got it?

A. After analyzing it myself, I would have forwarded the information to the corporate headquarters for their approv f these four individuals.

Q. How did you review that information given to you by Mr. Shonkwiler? What did your review consist of might be a better question?

A. Review would have consisted of Mr. Brieck's title, his job grade, his hire date, his age, race, and his ratings.

* * * *

Q. I assume you got a memo back from Dallas after you sent on—sent this information onto Dallas?

A. Either memo or phone call.

Q. Do you recall now after looking at Exhibit No. 5 what was the means of communication from Dallas to you that approved those four individuals?

A. No, I do not recall.

* * * *

[41] [Q.] In Mr. Faust's deposition this morning, he informed us he was laid off in November 1982 and thereafter he was called back as a permanent employee on or about August 1st, 1983. Do you know what were the considerations that were involved in hiring him back as

a fulltime employee in August 1983 and not Mr. Brieck—and not Mr. Brieck?

A. The same considerations in bringing him back were the ones that were taken into consideration in holding him on longer. As the business was going down, he was held longer because he had more flexibility. As it began to build back up again, he was brought back in again for the same reasons.

Q. Because he had more flexibility than Mr. Brieck did?

A. Yes.

Q. Do you recall there being any discussions about who to bring back when the need arose to have a full-time employee to perform the installation specialist function?

A. No, I don't.

Q. Would you or someone in your department have been contacted from an EEO viewpoint when that decision was made—or before that decision was [42] made to bring Mr. Faust back rather than either Mr. Brieck or Mr. Malarich or Mr. Meixsel?

A. We would have been notified, yes, that they were going to bring Mr. Faust back, for instance.

Q. Do you recall being notified?

A. Specifically in this case, I do not recall.

Q. You would have been notified?

A. Yes.

Q. Would you have had any opportunity to provide input into that decision?

A. Yes.

* * * *

DEPOSITION EXHIBIT 3

HARBISON-WALKER REFRACTORIES
Division of Dresser Industries, Inc.
2 Gateway Center, Pittsburgh, Pennsylvania 15222

EMPLOYEES

Month Ending June 30, 1980

	HOURLY	EXEMPT	NON-EXEMPT	TOTAL
UBCWA	568	92	46	706
OCAWIU (Ludington)	130	23	3	156
LIU (Calhoun)	230	32	9	271
USWA	2,286	342	164	2,792
NOU (Central District Prospecting)	2	0	0	2
(Vandalia Mines	9	0	0	9
CALSILITE OPERATIONS	40	18	11	69
GARBER RESEARCH CENTER	0	36	62	98

Continued

	HOURLY	EXEMPT	NON-EXEMPT	TOTAL
GENERAL OFFICE				
Breakdown:				
Executive	0	14	2	16
Finance	0	27	56	83
Industrial Relations	0	11	6	17
International	0	22	17	39
Manufacturing	0	53	24	77
Marketing	0	91	82	173
Planning	0	4	1	5
QUALITY CONTROL TEST CENTER	0	3	7	10
SALES OFFICES AND WAREHOUSES	1	118	71	190
TOTAL	3,266	886	561	4,713
CANADIAN REFRACTORIES DIVISION	518	150	79	747
GRAND TOTAL	3,784	1,036	640	5,460

HARBISON-WALKER REFRACTORIES
Division of Dresser Industries, Inc.
2 Gateway Center, Pittsburgh, Pennsylvania 15222

Month Ending October, 1982

	EXEMPT	NON-EXEMPT	HOURLY	TOTAL
ABGWIU	68	19	272	359
OCWIU (Ludington)	10	2	4	16
LIU (Calhoun)	29	7	152	188
USWA	237	51	866	1,154
NOU (Central District Prospecting) (Vandalia Mines)	000	000	3	3
CALSILITE OPERATIONS	10	6	53	69
DRESSER MINERALS-HOUSTON	5	2	0	7
GARBER RESEARCH CENTER	35	40	0	75

Continued

	EXEMPT	NON-EXEMPT	HOURLY	TOTAL
GENERAL OFFICE:				
Dresser Minerals-Pittsburgh	2	1	0	3
Executive;				
Group	10	2	0	12
U.S. Division	2	0	0	2
Finance	34	30	0	64
Industrial Relations	8	4	0	12
International	18	12	0	30
Manufacturing	43	14	0	57
Marketing	75	47	0	122
Planning	3	1	0	4
ON LOAN TO FOREIGN SUBS.	1	0	0	1
QUALITY CONTROL TEST CENTER	3	4	0	7
SALES OFFICES AND WAREHOUSES	122	38	0	160
TOTAL	715	280	1,350	2,345
CANADIAN REFRACTORIES DIVISION	130	48	201	379
GRAND TOTAL	845	328	1,551	2,724

HARBISON-WALKER REFRACTORIES
Division of Dresser Industries, Inc.
2 Gateway Center, Pittsburgh, Pennsylvania 15222

Month Ending May, 1983

	EXEMPT	NON-EXEMPT	HOURLY	TOTAL
ABGWIU	79	19	477	575
OCWIU (Ludington)	21	2	118	141
LIU (Calhoun)	28	7	151	186
USWA	188	46	989	1,223
NOU (Central District Prospecting) (Vandalia Mines)	0	0	0	000
CALSILITE OPERATIONS	10	5	54	69
DRESSER MINERALS-HOUSTON	3	2	0	5
GARBER RESEARCH CENTER	32	32	0	64

Continued

	EXEMPT	NON-EXEMPT	HOURLY	TOTAL
GENERAL OFFICE:				
Dresser Minerals-Pittsburgh	2	1	0	3
Executive;				
Group	9	2	0	11
U.S. Division	2	0	0	2
Finance	35	26	0	61
Industrial Relations	8	3	0	11
International	19	12	0	31
Manufacturing	40	14	0	54
Marketing	68	40	0	108
Planning	3	1	0	4
ON LOAN TO FOREIGN SUBS.	1	0	0	1
QUALITY CONTROL TEST CENTER	3	3	0	6
SALES OFFICES AND WAREHOUSES	114	29	0	143
TOTAL	665	244	1,789	2,698
CANADIAN REFRACTORIES DIVISION	106	32	229	367
GRAND TOTAL	771	276	2,018	3,065

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HARBISON-WALKER REFRACTORIES
Division of Dresser Industries, Inc.
2 Gateway Center, Pittsburgh, Pennsylvania 15222

Month Ending November, 1983

	EXEMPT	NON-EXEMPT	HOURLY	TOTAL
ABGWIU	88	23	570	681
OCWIU (Ludington)	21	2	115	138
LIU (Calhoun)	29	7	153	189
USWA	168	43	926	1,137
NOU (Central District Prospecting) (Vandalia Mines)	0	0	0	000
CALSILITE OPERATIONS	0	1	0	1
DRESSER MINERALS-HOUSTON	3	1	0	4
GARBER RESEARCH CENTER	30	31	0	61

Continued

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	EXEMPT	NON-EXEMPT	HOURLY	TOTAL
GENERAL OFFICE:				
Dresser Minerals-Pittsburgh	2	1	0	3
Executive;				
Group	6	1	0	7
U.S. Division	2	0	0	2
Finance	33	27	0	60
Industrial Relations	6	3	0	9
International	18	11	0	29
Manufacturing	36	15	0	51
Marketing	67	35	0	102
Planning	3	1	0	4
ON LOAN TO FOREIGN SUBS.	0	0	0	000
QUALITY CONTROL TEST CENTER	2	4	0	6
SALES OFFICES AND WAREHOUSES	105	29	0	134
TOTAL	619	235	1,764	2,618
CANADIAN REFRACTORIES DIVISION	103	34	276	413
GRAND TOTAL	722	269	2,040	3,031

DEPOSITION EXHIBIT 5

HARBISON-WALKER REFRACTORIES
Division of Dresser Industries, Inc.
2 Gateway Center, Pittsburgh, Pennsylvania 15222

To: J. M. Nicolella—20 North:

From: F. P. Shonkwiler

Subject: Personnel Changes—Justification

Date: 6/17/82

Refer:

CC: D.F.Stock
W.G.Sekeras
W.B.Lewis
File

The following proposed furloughs involve individuals with over 15 years' service but are necessary actions because of the extremely low level of Harbison business.

Specific explanations are as follows:

1) *E. F. Brieck*—Insufficient installation work for total Staff. Mr. Brieck is our least qualified Installation Specialist and has limited expertise.

2) *S. Hamilton*—Primary customers of this Field Sales Representative have shut their plants down and we do not have sufficient work in the Portsmouth area for a Sales Representative.

3) *J. Wojtulski*—Insufficient business at the Buffalo Service Center for both the Manager and the Warehouseman; therefore, we must furlough this man.

4) *C. Owens*—Insufficient business in the Detroit Service Center for both the Manager and the Warehouseman; therefore, we must furlough this man.

FPS/krb

/s/ F.P. Shonkwiler

1) Eugene F. Brieck-Installation Specialist, Iron & Steel Market

Name	Title	Job Grade	Hire Date	Age	EEO Cat.	Ratings 81	82
Brieck, Eugene F.	Installation Specialist	E-3	6-7-65	55	WM	FS	FS
*Faust, Hugh J.	Installation Specialist	E-3	9-1-66	39	WM	FS	FS
*Malarich, Albert G.	Installation Specialist	E-3	8-1-66	59	WM	FS	VG
2) Sharon W. Hamilton	Sales Rep.	E-3	9-1-62	44	WF	F	F

Portsmouth Sales Office closed. Works out of Plant. Plant is down. No alternative.

3) Joseph P. Wojtulski	Warehouse Attendant B	NE-4	4-22-68	36	WM	VG	VG

Only Warehouse Attendant. Operation will be run by Warehouse Mgr.

4) Claude L. Owens	Warehouse Truck Driver	NE-5	12-2-64	50	BM	VG	FS

One of two Truck Drivers. Both black males. Both being laid off. Operation will be run by Warehouse Manager-black male.

* Not Affected

DEPOSITION EXHIBIT 6

HARBISON-WALKER REFRACTORIES
Division of Dresser Industries, Inc.,
2 Gateway Center, Pittsburgh, Pennsylvania 15222

Richard G. Jewell
General Attorney

September 10, 1982

Mr. Joseph E. Retort
Pennsylvania Human Relations Commission
State Office Building
300 Liberty Avenue
Pittsburgh, Pennsylvania 15222

Subject: Docket No. E-23266
Eugene Brieck vs. Harbison-Walker Refractories, Division of Dresser Industries, Inc.

Dear Mr. Retort:

The following is submitted pursuant to your written requests made at our Fact Finding Conference on September 9, 1982:

1. Copy of Claimant's PID form. Note number 3 circled. This means fully satisfactory performance.
2. H. J. Faust is an Installation Specialist born May 31, 1943. In his job duties he assists in installation work, helps prepare project bids (financially) and helps make engineering sketches and technical preparation and proposals.
3. The other two individuals laid off are:
   (a) A. Malarich—Date of Birth: March 31, 1923, Date of Service: August 1, 1966, Lay Off Date: July 30, 1982.

(b) W. Meixsel—Date of Birth; July 28, 1923, Date of Service: January 28, 1980, Lay Off Date: July 9, 1982.

4. Information on engineers laid off:

(a) G. Dodds: Age 24—Laid Off July 9, 1982

(b) C. Maus: Age 26—Laid Off July 9, 1982

(c) D. Smith: Age 34—Laid Off July 12, 1982

(d) J. Schiffman: Age 25—Laid Off July 9, 1982

Finally enclosed is a written statement from L. L. Sheatsley concerning his recollection of the layoff interview.

We trust the foregoing is responsive to your needs. If you have any questions, please let me know.

Very truly yours,

/s/ Richard G. Jewell

RGJ/mak

Enclosures

cc: J. M. Nicolella

EXCERPTS FROM THE DEPOSITION OF HUGH J. FAUST

(Record, 299a-326a)

* * * *

[4] Q. How long have you been employed by Harbison-Walker?

A. September 1966.

Q. Have you been employed continuously from September 1966 to the present time with Harbison-Walker?

A. I was laid off.

Q. When were you laid off?

A. That was November 1982.

Q. Had you worked continuously for Harbison-Walker from September 1966 until November 1982 when you were laid off?

A. Correct.

[5] Q. How long were you laid off beginning in November 1982?

A. Wasn't the beginning on November '82. It was before Thanksgiving, I do not know the correct date. I came back August 1st, 1983. . . .

* * * *

Q. Did you come back in August of '83 to the same position you had held when you were laid off in November of '82?

A. Correct.

Q. Same basic duties?

A. Yes.

* * * *

Q. . . . Could you describe for me what your duties were in July of 1982?

A. I was assigned to the—I was in the iron and steel department. I was assigned to work with Stan Pavlica on blast furnace projects and [6] installations.

Q. How do you spell Pavlica?

A. P-a-v-l-i-c-a.

Q. What were your duties when you worked with Mr. Pavlica?

A. I went out on blast furnace installations. Covering brick installations and casthouse products.

Q. What were your duties when you went out in the field?

A. That was it.

Q. What did you do specifically? You didn't actually install the brick itself?

A. We always go out usually as an observer and make sure the bricks are installed so you can utilize—get the maximum out of your refractories.

Q. What are casthouse products?

A. Specifically tap hole material, and trough runner materials.

Q. Could you explain that for me very briefly?

A. Tap hole material—the blast furnace has a tap hole. The iron comes out of the tap hole. Obviously, you have to shut the iron off so the furnace can build up, make more iron. We have a product pushed in the tap hole to stop the flow of iron coming out. It's a relatively new product, [7] and we went out on a lot of installations involving that particular material. At the same time, we were getting involved in trough materials and a stream of iron comes out of the furnace, it comes into a trough, which is also lined with refractory materials. Also went out on installation of those.

Q. Did you go out with Mr. Pavlica?

A. No.

Q. You went out by yourself?

A. (Nodding head affirmatively.)

* * * *

[8] Q. What is your educational background?

A. Four years of college, no degree.

Q. High school graduate, I assume?

A. Yes.

* * * *

[9] Q. What was your major field of study?

A. Business.

* * * *

Q. What was your initial job position when you came with Harbison-Walker in September 1966?

A. Assistant correspondent.

* * * *

Q. What department was this?

A. It was called basic.

Q. In the basic department?

[10] A. Right.

Q. What kind of department was that?

A. It was—they handled orders, processed orders, quotations.

Q. What were your job duties as assistant correspondent?

A. Mostly pricing.

Q. Was it an office job?

A. Yes.

Q. How long did you remain in that capacity?

A. I truthfully can't say. Like I say, I don't keep records. If I had to guess, I'd say maybe four years or something like that.

Q. What was your next job position with Harbison-Walker and roughly when did your new position begin?

A. I can't—on the time frames I don't know. I moved up to correspondent.

Q. What did you do as correspondent?

A. Processed orders, had customer contact, make quotations. By that dictating, rather than working up prices.

Q. You say dictating?

A. Dictaphone. Somebody would give me the prices and I would just, you know, write it out and [11] send out all the paperwork. Sign my name, send it to the customer.

Q. Were you involved in sales at all or was your job more or less to support the sales staff?

A. Support the sales staff, but I did have direct contact with customers. On the phone. Phone contact.

Q. What percentage of your time was spent in the office when you were a correspondent?

A. One hundred percent.

Q. How long did you remain as a correspondent, approximately?

A. Five or six years.

Q. What was your next job position with Harbison-Walker?

A. Staff correspondent.

Q. Are we now talking about 1975 or 1976?

A. In that neighborhood. Your numbers aren't going to come out the same because I'm not sure how long I had each position. I do know the positions.

Q. What were your duties as staff correspondent?

A. I took care of the company cars. I did a lot of filing of product files, product development. At the time, I also handled what they call a check [12] point list, which is actually I gave marketing priorities on orders to manufacturing.

Q. Can you explain what that means?

A. We receive orders, orders are entered to different plants. Plants have to schedule the orders. So what I would do was get a listing of all the orders, send it out to the regions, ask them what their priorities for those orders were for the given manufacturing time schedule. Took all the orders from all the regions, and assigned the iron and steel market priority numbers on all orders to a given plant. And turned it over to manufacturing. That took the bulk of my time. This check point list.

Q. What percentage of your time—when you say the bulk, 50, 60, 70 percent or more than that even?

A. Say 50 percent.

Q. How long did you remain as staff correspondent, Mr. Faust?

A. I'd say three years, something like that. Like I say, numbers aren't going to work out.

Q. Were you involved in any installation specialist work during that period of time or when you were a correspondent or assistant correspondent?

[13] A. I did not do any installation work until I was a staff correspondent. One day someone tapped me on the shoulder, I forget who it was. He said, "It's time to go out and get metatarsal shoes. Here, you can borrow this old hat."

Q. Was this early on in your position as—let me finish the question— in your position as staff correspondent or later in those roughly three years when you were staff correspondent?

A. I'd say roughly after a year-and-a-half.

Q. What did you begin to do when the person said that you should get your metatarsal shoes?

A. Did it.

Q. How did they train you?

A. On-the-job training.

Q. What were you—how were you trained?

A. Good question. Usually we had a blueprint to follow, find out what sizes go where, what brands go where. Make certain that the installation is installed correctly, right shapes, correct brands in certain places. Speciality items, such as mortars and castable, a lot of it was and still is—you know how much to add—how much water to add to certain mixes, but it's still a feel and touch and look method to obtain proper [14] consistency.

* * * *

Q. How did you get trained so you would be able to develop the feel and touch you said that was needed to determine what the proper consistency was?

A. The idea of me going out on these installations. Before that, as a staff correspondent, I received all the product [15] development files and the—all the development work going on in the company. I read all those

files. So I knew a little something about the products themselves. But then through field assignments, you find out what's exactly needed for a particular job.

Q. When you were a staff correspondent, what percentage of your time was spent doing installation work, supervising installation work?

A. Maybe two, three days a month. Wasn't very often.

* * * *

Q. . . . Let me start over.

What was your next job position after you were staff correspondent?

A. Installation specialist. Here again, you're going to ask the time frame. I'm not sure.

* * * *

[16] Q. When did you receive more in-depth training to become an installation specialist than just going out two or three days per month?

A. When they sent me out on my own. Real education.

Q. Did they send you to any courses?

A. No.

Q. Nothing like that?

A. No. We would have occasionally meetings which I would attend. Sometimes go to research for meetings. But no college courses or anything like [17] that.

Q. It was almost all on-the-job training?

A. Right.

* * * *

Q. Can you describe what your duties were as an installation specialist?

A. Currently or—?

Q. When you first became an installation [18] specialist.

A. We got into that before. I was assigned to the blast furnace and I got into tap hole materials and trough materials, plus the installation of blast furnace linings,

blast furnace stoves, the complete package for blast furnaces.

Q. Had you ever been involved in sales in any respect during your employment with Harbison-Walker?

A. No, but we feel like we are a part of sales. Staff support.

Q. You support the sales, but you were never performing an actual sales function yourself?

A. No. But when a material worked, we would pursue it with the customer and let the salesman know what was going on, go after it.

Q. Did any of the other installation specialists have any experience in pricing or any of the duties you had performed when you were a correspondent or assistant correspondent? Or staff correspondent? To your knowledge?

A. Dave Cimini.

Q. How is his name spelled?

A. C-i-m-i-n-i.

Q. Did Mr. Brieck have any experience, to [19] your knowledge, in pricing or product development?

A. Not that I'm aware of.

Q. Did Mr. Malarich or Mr. [Meixell]—

A. [Meixell].

Q. Did any of them have any experience in pricing or in quotations of prices?

A. I can't answer for them.

Q. When you were in the office, did you ever hear any comments made by anyone about Mr. Brieck's work performance, whether that was either good or bad? Did you ever hear any positive or negative comments about Mr. Brieck's work performance?

A. No, because he was hardly ever there.

Q. He was in the field most of the time?

A. Right.

Q. Did you ever hear anyone complain about Mr. Brieck's work performance?

A. No.

Q. During the time that you were an installation specialist up until your layoff in November 1982, did you spend any percentage of your time doing office work as opposed to actual installation work?

A. Office work? Yes.

Q. Roughly what percentage of your time would [20] have been spent doing office work? As an installation specialist?

A. Maybe even 60 percent. . . .

* * * *

Q. Of the number of days in a month, what percentage of days would you be in the office and what percentage might you be in the field doing installation work?

A. 50/50.

Q. What type of office work did you do when you were an installation specialist?

A. Margins—

Q. What does that mean?

A. Figure out what the bottom line is on the cost. We quote things. But we also have certain costs. We have to know how much we are going to make on a certain job. Especially large jobs. [21] Always figure out what the bottom line is. A lot of times salesmen have to negotiate. We have to know what the bottom line is. Maybe we're willing to come down a little bit, maybe we're not.

Q. Who would you work with in helping to develop these margins?

A. I would work them up and give them to Stan Pavlica. Also do some figures for him of orders—blast furnace orders, kept track of the blast furnace files.

Q. Any other kind of office work you did as an installation specialist?

A. I can't think of anything offhand. I usually do a lot of things that people just tell me to do. Like a car needs fixed, got something out at advertising that we need. Whatever. Even drove a forklift down the warehouse one time.

Q. So if somebody had to go for something, you might have to do that?

A. Not have to, I would be asked nicely to do it. I would volunteer.

Q. Excuse me for degrading your role, but would part of your job be to be a gofer?

A. Sure. I don't mind doing that. It's something different.

[22] Q. I'm not saying anything bad about it, but part of your job was to be the office handyman?

A. Yeah. That was part of being staff correspondent. I like doing things for people. The department as a whole. It makes things go easier. Every department needs one.

* * * *

[25] Q. Did you ever have a private conversation with any of your superiors at any time from March of '82 until your layoff in November of '82 when you were told that you might be going pretty soon, that you might be laid off?

A. No, there was no inkling of it.

Q. Can you describe what did happen when you were laid off in November of '82?

A. I came back from a job and there was a [26] note on my desk to see Larry Sheatsley. At that time I knew that I was gone.

Q. Did you go see Mr. Sheatsley right away?

A. Sure.

Q. What did he tell you?

A. It was my turn.

Q. Can you recall what else he said to you about whether you might be recalled at any time in the near future?

A. No, that wasn't mentioned. In fact, I didn't think I'd ever get called back.

Q. What did he say to you in November '82?

A. That he was sorry, wished I didn't have to go, but money wasn't there anymore. I don't know how they

worked the layoffs out. I think it had to do with what their budgets were and they were told, you know, got to go.

Q. Did you talk to anyone other than Mr. Sheatsley about the layoff in November of '82?

A. Yes, Bill Sekeras.

Q. What did you say to Mr. Sekeras and what did he say to you? How do you spell Sekeras?

A. S-e-k-e-r-a-s.

Q. What was his job position?

A. Vice president marketing or something. Or [27] assistant at the time, I think.

Q. What did he say to you?

A. Just basically that the company was having hard times and hated to see me go.

Q. Did you—

A. There were no promises made that I would be called back or anything like that.

Q. Were you trying to appeal from what Mr. Sheatsley had told you when you talked to Mr. Sekeras?

A. No. You mean—

Q. Go over his head?

A. Cry or something like that, get on my hands and knees? No, I'm not the type.

Q. Or ask him if he could do something to overturn the decision?

A. No. I was told the decision—after so many years, the decision had to come from Dallas and they applied for it and they said let him go. I think at the time I had something like 14 years or 15 years.

* * * *

[28] Q. During the period of time from when you first became an installation specialist until your layoff in November of '82, did you have experience with any other type of steel or iron-making facilities other than blast furnaces?

A. Yes.

Q. What was that experience?

A. Well, it goes back to being a staff correspondent. Some of my initial installations had to do with electric furnaces and BOF's. I believe the—the job I relieved Gene on they called it a TOC, which is the same as a BOF.

Q. What about degassers?

A. Never. Still don't know anything about degassers. Don't know anything about open hearths.

Q. How about iron transfer ladles?

A. Yes.

Q. You have had experience with those?

A. Yes. That's part of blast furnace, [29] spinoff.

Q. About how many different installations have you been involved with where there have been electric furnaces?

A. Dozen.

Q. What about with BOF's?

A. Maybe 18.

Q. When you were hired, can you describe the circumstances of your being hired back? I don't want to put words in your mouth.

A. I remember it well. I was on a ladder, all full of paint, and my father came running out the back door and said Larry Sheatsley wants to talk to you. He said are you available for work the next day, and I said yes. Went into the office the next day, gave me all my cards back and an advance, and the day after that I was on the jobsite at Wheeling-Pittsburgh Monessen doing an iron transfer car as you call it. Hot metal car. They are called a lot of things.

Q. Was this August 1983?

A. I was there, yes.

Q. What has been your experience since you came back as an installation specialist in August of '83?

[30] A. More time on the road. After the Wheeling-Pittsburgh job, I was sent out to CFI on a special project in Pueblo, Colorado. It was specifically for electric furnace roofs, all brick roofs. We were following linings. I

was there for four and a half months. That was my longest job assignment.

Q. Since coming back in August of '83, what has been the percentage of time you would spend on the job—on the road as an installation specialist?

A. 75, I guess, at least.

Q. When you were involved in duties that aren't actual installations, what duties do you perform now, or what duties have you performed from August of '83 to the present date that have not been installation duties?

A. Pretty much been related to that—I write reports of the installation. Have to have time to come into the office to do that. I've also still done some work with the blast furnace group working on margins again. Doing some filing. Not very much anymore. It's just piling up. But I still—

Q. You do work with the blast furnace group?

[31] A. Right.

Q. You do filing, and what was the other thing you said?

A. Margins. Also some gofer work like getting drawings out to the works, to salesmen.

Q. When you write reports of installations, any installation specialist would have to do that?

A. Yes.

Q. Even someone like Mr. Brieck—someone like Mr. Brieck in his old duties would have had to fill out reports regarding installations he had been involved in?

A. Correct.

Q. That wouldn't be anything unusual for you to do?

A. No. Part of the job, but usually if you're in the Pittsburgh office, that's when you have time to write the reports.

Q. What percentage of your time since August of '83 has been spent doing margins? Very small percentage?

A. Small percentages, yes.

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted in printing]

DEFENDANT'S RESPONSE TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

* * * *

ANSWER: a. Plaintiff received an evaluation rating annually as a result of evaluation and review by his supervisors and department heads. The review rates employees according to five categories with the following descriptions assigned to each respective classification:

(5) Outstanding

Exceptional performance at a level usually not achieved by others. Assignments and responsibilities are being accomplished at the highest possible level of performance. To achieve this level of performance, it would be unusual for the employee to have been in this position for less than one year.

(4) Very Good

Fully meets and frequently exceeds the position requirements. Accomplishes assignments and responsibilities in an effective manner. Results always meet normal standards. Shows definite progress in performance.

(3) Fully Satisfactory

Consistently meets position requirement. Accomplishments and responsibilities are accomplished effectively and in line with the normal standards of the job.

(2) Fair

Normally meets minimum position requirements, but occasionally performs less than expected. Assignments are being accomplished, but sometimes with less than normal effectiveness. Demonstrates progress in meeting job performance standards.

(1) Unsatisfactory

Unable to consistently meet minimum job requirements. Performance is frequently below standards and results are unacceptable.

* * * *

c. During the 1978 through 1982 period, Mr. Brieck was rated as follows: 1978—3; 1979—2; 1980—2; 1981—3; 1982—3.

* * * *

HANDWRITTEN NOTE FROM D. JAMISON TO E. BRIECK

Gene,

In case I forget to tell you the next time we talk, you have received an $83/month raise effective 3/1/82. This brings your monthly salary to $2,162.

The merit raise is well deserved and we hope that we can continue to reward you for your good work.

Enclosed is a copy of TT about EF bottom job a[t] Bayou starting 5/13. I expect you will be back from Turkey by then.

Again, thanks for your fine efforts.

/s/ Don

3/24/82

Supreme Court, U.S.
FILED
MAY 5
JOSEPH F. SPANIOL
CLERK

No. 87-271

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

HARBISON-WALKER REFRACTORIES,
A DIVISION OF DRESSER INDUSTRIES, INC.,
Petitioner,
v.
EUGENE F. BRIECK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a plaintiff who alleges intentional discrimination can survive summary judgment merely by questioning his employer's business judgment, without presenting any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-271

HARBISON-WALKER REFRACTORIES,
A DIVISION OF DRESSER INDUSTRIES, INC.,
Petitioner,

v.

EUGENE F. BRIECK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Third Circuit appears in the Appendix to the Petition for Certiorari ("Pet. App.") at pp. 1a to 11a. The December 19, 1985 opinion and order of the United States District Court for the Western District of Pennsylvania granting Petitioner's motion for summary judgment is reported at 624 F. Supp. 363, and is reproduced in the Appendix to the Petition at pp. 12a to 21a. The District Court's January 16, 1986 memorandum opinion and order denying Respondent's request for reconsideration are unreported and appear in the Appendix to the Petition at pp. 22a to 25a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 19, 1987. Petitioner filed a timely petition for a writ of certiorari on August 17, 1987, which this Court granted by Order dated March 21, 1988. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (1982).

STATUTE INVOLVED

Section 4(a)(1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* (1982) ("ADEA" or the "Act"), provides in pertinent part that:

> It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . .

29 U.S.C. § 623(a)(1) (1982).

STATEMENT

This case involves the business decision of Petitioner, Harbison-Walker Refractories, a Division of Dresser Industries, Inc. ("Harbison-Walker" or the "Company"), to lay off Respondent Eugene Brieck during an economically-induced reduction in force. The Company, which sells specialized ceramic brick products primarily to steel producers (Affidavit of William Sekeras, ¶ 2; Joint Appendix ("J.A.") 12), hired Respondent in June 1965 as a specialist to supervise the installation of those products (Deposition of Eugene Brieck, J.A. 59-60). Respondent worked in the Company's Iron and Steel Marketing Support Group (the "Steel Group"), which employed three other installation specialists as of July 1982. Sekeras Affidavit, Ex. D (J.A. 31). The ages and years of service of the four installation specialists were as follows:

	Age	Years of Service
Eugene Brieck	55	17 years
W.L. Meixell	59	2 years/6 months
Al Malarich	59	15 years/10 months
Hugh Faust	39	15 years/9 months

Id.

Between 1980 and 1982, the Company's sales of ceramic brick products had fallen nearly 35 percent due to the economic decline among its steel industry customers. Sekeras Affidavit, Ex. A (J.A. 17). Mirroring decreased sales, the Company's profits from the sale of brick products plummeted from approximately $64 million in 1979 to a deficit of $20 million in just three years. *Id.* Service functions tied to the Company's brick sales, including installation work, also declined substantially. Sekeras Affidavit, ¶ 9 (J.A. 14); Deposition of Larry Sheatsley (J.A. 103-05).

Faced with mounting losses, Harbison-Walker began to reduce headcount in early July 1982. Sekeras Affidavit, ¶ 3-4 (J.A. 12-13). In making difficult layoff decisions, the Company considered both "[l]ength of company service and skill requirements necessary to carry out the reduced business activities . . . ." *Dresser News* (J.A. 47); Sekeras Affidavit, ¶ 4 (J.A. 13). The Company's Vice-President of Marketing emphasized the need for flexible and multi-skilled workers in a July 8, 1982 memorandum to the Company's regional offices (J.A. 118):

> With this reduction in forces, there will be considerable overlapping of job responsibilities and I am counting on each of you to pull your teams together to fully accomplish maximum sales under these conditions. Sales people will be required to do service work in the warehouses as needed, answer telephones as required, and follow installations as required.

Applying these standards, in July 1982, the Company initially laid off six of the 32 employees in the Steel

Group, including two installation specialists: Respondent, then 55 years of age, and Meixell, an older but substantially less senior installation specialist. Sekeras Affidavit, Ex. F (J.A. 33). It retained two other long-service installation specialists, 59-year-old Malarich and 39-year-old Faust, both of whom had almost as much seniority as Respondent. *Id.* It retained these two installation specialists because their varied experience made them the most versatile. Sekeras Affidavit, ¶ 9 (J.A. 14-15); Sheatsley Deposition (J.A. 105-06). Indeed, Faust was an ideal candidate for retention because, for the last several years, he had split his time almost equally between performing installation work and office work. Deposition of Hugh Faust (J.A. 156).

Within a month, the Company laid off Malarich, but retained Faust for an additional four months. Sekeras Affidavit, Ex. F (J.A. 33); Sheatsley Deposition (J.A. 111-12). Because of his diverse skills and broad experience, Faust was more versatile than the other specialists, including Respondent. Faust—unlike Respondent—had considerable prior experience with records and written reports, substantial experience in customer relations and in preparing bids and quotations, and experience in installation work in blast furnace casthouses—a targeted growth area for Harbison-Walker. Sekeras Affidavit, ¶ 9 (J.A. 14-15); Sheatsley Deposition (J.A. 105-06); Faust Deposition (J.A. 149-55). In addition, Faust had higher performance ratings than Respondent in three of the four years between 1978 and 1981. Sekeras Affidavit, ¶ 9 (J.A. 15).

On November 18, 1982, when economic conditions remained poor, the Company laid off Faust, its only remaining installation specialist. Sekeras Affidavit, Ex. F (J.A. 33). As of that date, the Steel Group—which had employed 32 individuals just five months earlier—had shrunk to 21 employees. *Id.*, Ex. E (J.A. 32). Of these 21 employees, over half were over age 40. *Id.* In fact, only three of the twelve employees laid off from the

Steel Group, the three installation specialists, were 40 years of age or older. *Id.*, Ex. F (J.A. 33).[1]

In the spring of 1983, Harbison-Walker recalled Malarich, the oldest installation specialist, for a temporary project and ultimately for a permanent position in the Steel Group. Deposition of Donald Jamison (J.A. 123-25). When Malarich decided to retire voluntarily at age 60, the Company recalled Faust. *Id.* It recalled Faust, instead of Respondent, for the same reasons that it had retained Faust longer: his greater versatility. Sekeras Affidavit, ¶ 9 (J.A. 15). After his recall, Faust performed installation work for approximately 75 percent of his time. Faust Deposition (J.A. 159-60). He spent the remaining portion of his time performing work consisting, at least in part, of tasks that Respondent had neither the experience nor training to perform. *Id.*

The Proceedings Below

On June 29, 1984, Respondent filed suit against Harbison-Walker, alleging that the Company terminated and failed to recall him because of his age in violation of the ADEA (J.A. 2-7).[2] After discovery, the Company moved for summary judgment. It argued that Respondent had not established a prima facie case of age discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); that, even assuming that he had, the Company terminated him for legitimate, nondiscrimi-

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[1] To ensure adequate protection for its more senior employees in layoffs and compliance with federal equal employment opportunity requirements, the Company had in place—and followed in this case—a policy requiring corporate review of any layoff recommendation affecting an employee with more than 15 years of service. That review process, as applied to Respondent, resulted in affirming the layoff recommendations of his supervisors. Deposition of John Nicolella (J.A. 128-32).

[2] Respondent filed his administrative charge, a jurisdictional prerequisite to his subsequent lawsuit, on July 19, 1982, shortly after the Company had laid him off but had retained Malarich and Faust (J.A. 6).

natory business reasons; and that Respondent failed to produce any evidence that the Company's proffered business reasons were a pretext for age discrimination.

To support its motion, the Company offered admissible evidence to demonstrate that the economic downturn in its business necessitated the reduction in force that eliminated Respondent's job; that Faust had higher performance ratings than Respondent; and that Faust had skills in marketing and administrative matters—skills that Respondent had neither the experience nor the training to perform—which the Company could draw upon in a reduced work environment. The Company, moreover, produced the following positive evidence that age played no role in its decision to lay off Respondent: (a) Company policy gave positive credit for years of service in layoffs; (b) the Company required a high-level review of any decisions to lay off an employee with more than 15 years of service; (c) only three of the twelve employees laid off from the Steel Group in 1982 were over age 40; (d) after the layoffs, over half of the employees remaining in the Group were over age 40; (e) the average age of the Group actually increased as a result of the layoffs, from 38.25 years in June 1982 to 39.61 years in December 1982; (f) the Company recalled an older installation specialist, 59-year-old Malarich, in 1983 before Faust; and (g) the Company had hired Meixell as an installation specialist in 1980 when he was 57 years of age.

Respondent opposed summary judgment. In so doing, however, he did not dispute the objective facts underlying the Company's decision. He conceded that the economic downturn in Harbison-Walker's business prompted his layoff (J.A. 94), that Faust had more diverse skills than Respondent (J.A. 52-53), and that the Company, from time to time, drew upon those more diverse skills in the reduced work environment (J.A. 44). He did not come forward with any specific facts—other than the undis-

puted fact that Respondent was older than Faust—to show that a genuine dispute existed for trial. He produced no direct evidence that age in any way motivated Harbison-Walker's decision and no indirect evidence (e.g., evidence of age-related remarks or statistics) of age discrimination. Brieck Deposition (J.A. 94-96). Instead, Respondent opposed summary judgment with nothing more than self-serving statements that he believed he was better qualified than Faust to perform any available installation specialist work, that he believed he could have been trained to perform the marketing and administrative functions that Faust could already perform, and that, in any event, he believed Faust's superior experience was unimportant because he spent less than 25 percent of his time, after recall, on matters requiring that experience (J.A. 44, 51-53).

Finding no material facts in dispute, the district court granted the Company's summary judgment motion. Although holding that Respondent had established a prima facie case of age discrimination, it nonetheless concluded that the Company had advanced legitimate, nondiscriminatory business reasons for its decision to lay off Respondent instead of Faust. Pet App. 15a-17a. It found that, although Faust had slightly less seniority than Respondent, he had better performance evaluations and broader experience in marketing and administrative functions. Pet. App. 16a. Rejecting Respondent's efforts to downplay the importance of Faust's more diverse experience, the court noted that "[a]ny question about the appropriateness of how Faust spends his time edges into the area of judicial scrutiny of business decisions." Pet. App. 17a. Because Respondent merely questioned the Company's business judgment, without "forg[ing] the critical link between [the challenged] actions and [Respondent's] age with *relevant* proof," Pet. App. 23a (emphasis in original), Respondent's conclusory statements could not discharge his burden of persuasion that age motivated the Company's decision. In so holding, the district court noted that the indirect evidence proffered

by the Company (e.g., the statistics showing that the Company had an older workforce after the 1982 layoffs) "further highlight[s] Mr. Brieck's absence of proof that defendant's justification for his layoff is a pretext for age discrimination." Pet. App. 17a. Thus, absent evidence that any possible error in Harbison-Walker's business judgment was a pretext for age discrimination, the district court declined Respondent's invitation to second-guess the Company's decision.

The Third Circuit reversed. It held that, on summary judgment, the Company bears the "burden" of demonstrating that the plaintiff "will be unable to introduce either direct evidence of a purpose to discriminate, or indirect evidence of that purpose by showing that the proffered reason is subject to factual dispute." Pet. App. 4a. Although Respondent had produced no evidence—other than the age differential between him and Faust—linking the Company's decision to age, the court below concluded that Respondent's self-serving assessment of his employer's business needs precluded summary judgment. Focusing on the fact that, in hindsight, Faust spent less than 25 percent of his time, after recall, on matters requiring his diverse skills—the sole fact which the court below deemed "inconsistent" with the Company's asserted reason for retaining him—the court below stated:

> We held in *Chipollini* that to defeat a summary judgment motion based only on an employer's proffered evidence of a non-discriminatory animus, an ADEA plaintiff's evidence need only permit a reasonable inference that the employer's proffered explanation for the discharge is unworthy of credence. We find that the record before us contains 'evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge (which) reasonably *could* support an inference that the employer did not act for (those) non-discriminatory reasons.'

Pet. App. 2a, citing *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir), *cert. dismissed on stipulation*, 108 S. Ct. 26 (1987). Because the court below viewed the only "question on summary judgment [to be] whether evidence of the duties actually performed by Faust upon his recall could cast doubt on the defendant's assertion that Faust was retained because of his more diverse skills"—a question that it answered affirmatively—it reversed the district court's grant of summary judgment. Pet. App. 6a.

Judge Weis dissented. He found that Respondent's subjective appraisal of his and Faust's qualifications did not demonstrate any implausibility in the Company's principal stated reason for preferring Faust, in that Respondent admitted that his skills did "not match his rival's diverse abilities." Pet. App. 10a.[3] Focusing on the "implausibility" that the majority found dispositive, Judge Weis reasoned (Pet. App. 9a-10a):

> [P]laintiff contends that because Faust spent twenty-five percent of his time after recall preparing reports of installations (an activity Brieck had performed) as well as working on 'margins' and filing (tasks which Brieck neither had done nor was trained to do), the employer has failed to demonstrate its need for Faust's diverse qualifications. . . .
>
> When reduced company operations warrant the service of one installation specialist for only seventy-five percent of his time, efficiency requires some utilization of the remaining twenty-five percent. Although plaintiff may argue he could work as effectively for

[3] Noting that Malarich was not only older than Respondent, but better qualified, Judge Weis stated:

> If the company needed only one installation specialist and if Faust's qualifications were as inadequate as plaintiff believes, then one would have expected defendant to furlough Faust. But in that event, Malarich, and not plaintiff, would have been the one retained. The plaintiff's failure to address the fact that Malarich was given preference undercuts the claim of discrimination in favor of Faust at the time of the plaintiff's layoff.

Pet. App. 8a-9a.

> part of that time, significantly he cannot prove his ability to perform equally well for the entire 25 percent period. The concession that he, unlike his rivals, might require training only underscores the validity of the employer's reason for selecting Faust.

Judge Weis thus concluded that Respondent had "failed to show a dispute of fact on a material issue which would demonstrate pretext." Pet. App. 11a.[4]

SUMMARY OF ARGUMENT

The decision below discards an essential element of evidence required in employment discrimination cases since this Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973): proof of unlawful discrimination. The decision below means that a plaintiff who alleges intentional age discrimination can present his case to a jury merely by questioning his employer's business judgment and without producing any direct or indirect evidence that discrimination motivated that judgment. That standard cannot be squared with the principles consistently laid down by this Court.

The decision below ignores the well-settled principle that the ultimate burden of persuasion in a discrimination case "remains at all times with the plaintiff" who must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Although that burden need not be met with direct evidence of discrimination, it must be met with *some* sort of evidence that discrimination played a role in the challenged decision. The decision below

[4] In so concluding, Judge Weis distinguished the majority opinion that he had joined in *Chipollini*. He reasoned that in *Chipollini*, unlike here, the laid-off plaintiff produced specific evidence that contradicted the facts proffered by the employer in support of its decision. Pet. App. 10a.

aptly demonstrates the pitfalls of requiring less. It means that, where a plaintiff can point to some age-neutral evidence that his employer, in his opinion, made a less than perfect business decision, juries can substitute their own notion of "fairness" for the employer's business judgment. This Court's conclusion in *Burdine* that a plaintiff can prove pretext with indirect evidence that the employer's explanation for its decision is "unworthy of credence" neither requires nor permits that result.

Nor can the decision below be reconciled with this Court's principles governing summary judgment. Summary judgment *must* be entered against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The court below substantially enlarged the Company's legitimate summary judgment burden (i.e., to prove that all material facts are undisputed) by requiring the Company to prove that the plaintiff will be "unable" to produce any evidence of discrimination. Such a burden is not only virtually impossible to satisfy, but it alters the burdens that this Court has defined under Rule 56 of the Federal Rules of Civil Procedure. Allowing trials in cases where, as here, a plaintiff has produced no direct or indirect evidence of age discrimination—even though he bears the ultimate burden of proving discrimination at trial—thwarts the policies underlying Rule 56 and this Court's summary judgment decisions.

Although economic reductions in force create difficult business decisions for employers and produce sympathetic victims, the ADEA provides redress only where age discrimination played a role in those decisions. Because Respondent offered no evidence that age played such a role here, the Court should reverse.

ARGUMENT

I. THE DECISION BELOW FAILS TO FOLLOW THIS COURT'S DECISIONS GOVERNING THE EVIDENTIARY BURDENS APPLICABLE TO EMPLOYMENT DISCRIMINATION CASES.

The decision below fails without warrant to follow the principles established by this Court to govern the burdens of proof in employment discrimination cases. Reduced to its core, the decision below permits an ADEA plaintiff to present his case to a jury without producing any direct or indirect evidence linking a challenged employment decision to age discrimination. It does so even though the ultimate burden of proving age discrimination "remains at all times with the plaintiff," *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 253, citing *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 n.2 (1978), and even though summary judgment is proper against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Because the decision misinterprets the crucial inquiry in age discrimination cases—namely, whether the plaintiff has produced sufficient evidence from which a jury can conclude that he is a victim of discrimination "because of [his] age," 29 U.S.C. § 623(a)(1) (1982)—this Court should reverse the decision below.

A. The Court Below Misapplied The Well-Established Substantive Standards Applicable To Employment Discrimination Cases.

The well-settled principles articulated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802-05, and its progeny, govern this case.[5] Under the evidentiary framework established in *McDonnell Douglas*, a plaintiff bears the initial "burden of proving by the preponderance of the evidence a prima facie case of discrimination." *Burdine*, 450 U.S. at 252-53; *see also McDonnell Douglas*, 411 U.S. at 802.[6] Once he does so, giving rise to a "presumption that the employer unlawfully discriminated against the employee," *Burdine*, 450 U.S. at 254, the burden then "shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employ[ment action].'" *Burdine*, 450 U.S. at 253, *quoting McDonnell Douglas*, 411 U.S. at 802; *see also Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). If the employer carries this burden of production, it "destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence," and "the factual inquiry proceeds to a new level of specificity." *Burdine*, 450 U.S. at 255 and n.10.[7]

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[5] Although *McDonnell Douglas* involved race, rather than age, discrimination, courts have applied its evidentiary framework, almost without exception, to the ADEA. *See Dale v. Chicago Tribune Co.*, 797 F.2d 458, 462 n.1 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987); *Thornbrough v. Columbus & Greenville Railroad Co.*, 760 F.2d 633, 638 n.4 (5th Cir. 1985); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1396 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014-19 (1st Cir. 1979); *but see Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 940-41 (6th Cir. 1987); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 (6th Cir. 1975).

[6] This burden is "not onerous." *Burdine*, 450 U.S. at 253. Indeed, in some circuits, including the Third Circuit, a plaintiff can establish a prima facie case merely by demonstrating that he is in the protected age group and was laid off while younger employees were retained in similar jobs for which he was qualified. *See Duffy v. Wheeling-Pittsburgh Steel Corp.*, 738 F.2d at 1395; *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983); *Thornbrough v. Columbus & Greenville Railroad Co.*, 760 F.2d at 641-45; *but see Simpson v. Midland-Ross Corp.*, 823 F.2d at 941; *Leichihman v. Pickwick International*, 814 F.2d 1263, 1270 (8th Cir.), *cert. denied*, 108 S. Ct. 161 (1987).

[7] Thus, it is obvious that "[a] *McDonnell Douglas* prima facie showing is not the equivalent of a factual finding of discrimination." *Furnco*, 438 U.S. at 579. But even though "the presumption

Because the ultimate burden of persuasion "remains *at all times* with the plaintiff," he must then "prove by a preponderance of evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* at 253 (emphasis added). As this Court explained in *Burdine*:

> *This burden now merges with the [plaintiff's] ultimate burden of persuading the court that she has been the victim of intentional discrimination.* She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or *indirectly by showing that the employer's proffered explanation is unworthy of credence. See McDonnell Douglas*, 411 U.S., at 804-05.

Id. at 256 (emphasis added). Once the plaintiff has had the opportunity to do so, the factfinder must then decide the ultimate issue: whether "the defendant *intentionally discriminated* against the plaintiff." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (emphasis added).

Viewing the evidence presented "through the prism of the[se] substantive evidentiary burden[s]," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986), it is plain that where an employer, in moving for summary judgment, offers legitimate, nondiscriminatory reasons for its conduct, an ADEA plaintiff must produce specific facts to create a genuine dispute as to the essential element of his case: whether "the legitimate reasons offered by the defendant were . . . a *pretext for* [*age*] *discrimination.*" *Burdine*, 450 U.S. at 253 (emphasis added). To do so, he need not produce direct evidence of discriminatory intent. *Aikens*, 460 U.S. at 714 n.3. *Burdine* and *Aikens* make clear that a plaintiff can rely upon indirect

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drops from the case" when the employer explains its conduct, the factfinder may nonetheless consider the plaintiff's initial evidence in deciding the ultimate issue of discrimination. *Burdine*, 450 U.S. at 255 n.10.

evidence to demonstrate that the employer's reason is a pretext for prohibited discrimination and is "unworthy of credence." But that indirect evidence must be sufficiently probative of the ultimate issue in the case—discrimination on the basis of age—so that "a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252.[8] Thus, a jury could infer discrimination from indirect evidence that an employer made a particular employment decision in contravention of established and consistently-applied procedures, *see, e.g., Krodel v. Young*, 748 F.2d 701, 710 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985); that management personnel made comments reflecting a negative attitude toward older workers, *see, e.g., Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529-30 (11th Cir. 1987); *Krodel v. Young*, 748 F.2d at 710; *Perez v. Curcio*, 841 F.2d 255, 257-58 (9th Cir. 1988); that company documents indicate a preference for younger employees, *see, e.g., Loeb v. Textron, Inc.*, 600 F.2d at 1017; or that relevant statistics demon-

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[8] *See Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983) (to avoid summary judgment based on challenges to an employer's proferred reasons, employees must produce "specific, substantive evidence of pretext and that age was a determining factor in the decision"); *Young v. General Foods Corp.*, 840 F.2d 825, 829 (11th Cir. 1988) ("Because the plaintiff bears the burden of establishing pretext, he must present 'significantly probative' evidence on the issue to avoid summary judgment"); *Askin v. Firestone Tire & Rubber Co.*, 785 F.2d 307 (6th Cir. 1986), *aff'g without opinion*, 600 F. Supp. 751, 755-56 (E.D. Ky. 1985). The nature and quantum of that evidence may vary depending upon the employer's proffered reasons. *See Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595-96 (11th Cir. 1987); Milone, *Age Discrimination: Proving Pretext Under the ADEA*, 13 Empl. Rel. L.J. 104, 118-19 (1987). Because, in this case, the facts underlying the employer's stated reasons are undisputed, *see* discussion *supra* at 6-7, this Court need not decide here whether summary judgment is proper where a plaintiff shows that the employer's proffered reason for its action is objectively false.

strate a pattern of adverse treatment of older workers. *See generally McDonnell Douglas*, 411 U.S. at 804-05.[9]

These principles require reversal here. In concluding that Respondent is entitled to present his case to a jury, the court below effectively relieved him of his burden of producing specific facts linking the challenged employment decision to age discrimination. Despite *Burdine's* mandate, Respondent produced no direct evidence that Harbison-Walker's decision was motivated by age discrimination. Nor did he present any indirect evidence that the Company's proffered reasons were "unworthy of credence." To the contrary, Respondent conceded the objective facts underlying the Company's proffered reasons for its retention of Faust instead of Respondent. The court below so found: Respondent "introduced no evidence to counter the assertion that Faust's prior experience with office matters . . . distinguishes his qualifications from those of [Respondent]" and that "there is no issue regarding the appropriateness of Harbison-Walker's employment of Faust." Pet. App. 4a, 6a.[10]

Despite the objective accuracy of the Company's proffered reasons and despite the substantial indirect evidence negating age discrimination, the court below concluded that Respondent should nonetheless be permited to take his case to a jury. It did so by finding that Respondent had "cast doubt" on the credibility of

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[9] The reason for requiring evidence linking an employment decision to age is obvious. An employer can have "pretextual", but entirely benign, reasons for its action. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d at 903 (Hunter, J., dissenting).

[10] On the evidence presented, the court could not have found otherwise. *See Dale v. Chicago Tribune Co.*, 797 F.2d at 464 (an ADEA plaintiff cannot survive summary judgment merely by "challeng[ing] the judgment of his superiors through his own self-interested assertions"). An even cursory review of Respondent's affidavit reveals that it is bottomed not on substantiating facts, but on self-serving allegations that he was, e.g., the most qualified and versatile installation specialist (J.A. 51-54).

the Company's stated reasons—based only on the fact that, in hindsight, the Company used Faust's more diverse skills after his recall less than 25 percent of the time—so as to "permit a reasonable inference that the . . . proffered explanation . . . is unworthy of credence." Pet. App. at 2a. But *Burdine*'s "unworthy of credence" language requires more. A finding of pretext does not flow—directly or inferentially—from evidence that merely casts doubt on the wisdom of the employer's stated reason. *See White v. Vathally*, 732 F.2d 1037, 1043 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984) ("[m]erely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent").[11] To meet his burden of creating a genuine dispute as to pretext, therefore, Respondent had to do more. He had to produce probative evidence from which a fair-minded jury could infer "that the legitimate reasons offered by the defendant were not its true reasons, but were a *pretext for discrimination.*" *Burdine*, 450 U.S. at 253 (emphasis added); *see also McDonnell Douglas*, 411 U.S. at 805 (emphasis added) (plaintiff must prove "by competent evidence that the presumptively valid reasons for [the employment action] were in fact a coverup for a . . . *discriminatory* decision").

Respondent produced—and the court below required—substantially less. Respondent presented no specific facts, beyond the fact that the laid-off installation specialists were older than Faust, to demonstrate that the Company's articulated reasons were pretextual. He pointed to no documents or oral remarks suggesting that the Company harbored animus toward older workers, no evidence that the Company failed to comply with cor-

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[11] *See also Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 941 (6th Cir. 1987); *Dea v. Look*, 810 F.2d 12, 15 (1st Cir. 1987).

porate procedures or applied them in a discriminatory manner, and no statistics relevant to or probative of age discrimination. He failed to do so, moreover, in the face of substantial objective evidence that the Company's action was age-neutral. That evidence—e.g., that the Company generally rated Faust's job performance higher than Respondent's; that over half of the employees in the post-reduction Steel Group were in the protected age group; that only three of the twelve employees laid off from that group were over age 40; that the Company followed its informal layoff criteria, requiring consideration of length of service *and* needed skills in a reduced work environment, in retaining Faust instead of Respondent; and that the Company initially retained and recalled an *older* employee, Malarich, instead of Respondent—plainly negates any inference of age discrimination.[12]

The contrary conclusion of the court below is thus wrong as a matter of fact and law. Because Respondent failed completely to forge any link between the challenged decision and age discrimination, the court below erred in concluding that a fair-minded jury could infer that the Company discriminated against him "because of [his] age." 29 U.S.C. § 623(a)(1) (1982). To conclude otherwise—and permit ADEA plaintiffs to defeat summary judgment without producing any direct or indirect evidence of age discrimination—would drastically alter the evidentiary framework established by this Court to govern employment discrimination cases.

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[12] *See Grigsby v. Reynolds Metal Co.*, 821 F.2d 590, 596 (11th Cir. 1987) ("conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [an employer] has offered . . . extensive evidence of legitimate, nondiscriminatory reasons for its actions"); *see also Young v. General Foods Corp.*, 840 F.2d at 830.

B. The Standard Applied By The Court Below Improperly Permits ADEA Plaintiffs To Survive Summary Judgment Merely By Challenging The Wisdom Of Their Employer's Business Judgment.

Not only does the standard applied by the court below read age out of the well-established analytical framework for discrimination cases, but its overly literal interpretation of *Burdine*'s "unworthy of credence" language collides with another principle established by this Court: that the ADEA "was not intended to 'diminish traditional management prerogatives.'" *Burdine*, 450 U.S. at 259, quoting *United Steelworkers of America v. Weber*, 443 U.S. 193, 205-06 (1979).[13] The Third Circuit's standard—which permits an ADEA plaintiff to survive summary judgment merely by challenging his employer's business judgment and without producing any evidence that age motivated that judgment—improperly converts the ADEA into "a vehicle for judicial review of business decisions." *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981). It should be reversed.

That a pretext standard divorced from age opens the door for courts and juries to second-guess an employer's business judgment is all too evident here. Relying on its interpretation of *Burdine*'s "unworthy of credence" language, the court below found that a jury could find pretext based solely on a post-hoc analysis of the facts, i.e., by examining events occurring long after the Company

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[13] This Court has recognized that "Title VII would not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business." *United Steelworkers of America v. Weber*, 443 U.S. at 207. These "legislators demanded as a price for their support that 'management prerogatives . . . [would] be left undisturbed to the greatest extent possible.'" *Id.* at 206, *quoting* H.R. Rep. No. 915, 88th Cong., 2d Sess., pt. 2, at 29 (1963). *See also Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501, 106 S. Ct. 3063, 3075 (1986).

made its allegedly unlawful decision to lay off Respondent in July 1982. According to the court below, the proper benchmark for assessing the propriety of the Company's decision to retain Faust longer than Respondent and to recall Faust from layoff was the type of work that Faust performed after his recall in August 1983—over a year after Respondent's layoff. The court below concluded that this after-the-fact review, which showed that Faust worked less than 25 percent of his time on projects for which Respondent was not trained, demonstrated the inappropriateness of summary judgment and, by implication, overcame both the absence of any evidence of discriminatory motive and the presence of evidence showing the Company's age-neutral conduct. To adopt this misfocused analysis, however, would not only require an astounding business prescience on the part of the Company, but would permit juries to assess virtually all business judgments in ADEA cases even though no evidence links those judgments to age discrimination. The relevant question is not what Faust did do when he returned to employment, but what Faust was capable of doing, and what the Company reasonably expected Faust might do, at the time Respondent was laid off.

In effect, the decision below means that an employer can never prevail on summary judgment—despite the absence of direct or indirect evidence of age discrimination—if it makes a less than perfect assessment of its future personnel needs based on less than stable economic predictors. But neither the ADEA nor *Burdine's* "unworthy of credence" language requires an employer to make a perfect business decision or even a good one. *See Dale v. Chicago Tribune Co.*, 797 F.2d at 464. Rather, "[t]he ADEA only requires the intervention of the federal judiciary when age is a determining factor in the decision." *Parker v. Federal National Mortgage Association*, 741 F.2d 975, 981 (7th Cir. 1984). Because age is not a factor here, the Company's business judgment should not be disturbed.

II. THE COURT BELOW APPLIED AN INCORRECT STANDARD UNDER RULE 56 AND REACHED A RESULT INCONSISTENT WITH THE POLICIES UNDERLYING THE RULE.

The decision below contravenes this Court's interpretation of Rule 56 of the Federal Rules of Civil Procedure. Contrary to the principles confirmed in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the decision below plainly misallocates the burdens on summary judgment, focuses on immaterial facts to deny summary judgment, and emasculates the policies underlying Rule 56. It should be reversed.

A. The Court Below Improperly Required The Company To Negate Respondent's Claims.

An employer seeking summary judgment in an employment discrimination case bears the burden of showing the absence of a genuine issue of material fact. *See* Fed. R. Civ. P. 56(c). But *Celotex* makes clear that the movant need not produce evidence "negating the opponent's claim." 477 U.S. at 323. The movant is not required "to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof," but can instead discharge its burden "by 'showing'—that is, pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

The Company satisfied that burden below. Although it pointed out the complete absence of record evidence to support a finding of age discrimination,[14] the court

[14] In fact, it did more. It proffered legitimate, nondiscriminatory reasons for its action—Faust's more diverse skills and higher performance ratings—and produced substantial indirect evidence that it harbored no unlawful animus toward older workers in general or Respondent in particular. *See* discussion *supra* at 5-6, 18.

below found summary judgment to be inappropriate. In so doing, it imposed on the Company a burden more substantial than *Celotex* requires: to "show that the plaintiff will be *unable* to introduce either direct evidence of a purpose to discriminate, or indirect evidence of that purpose by showing that the proffered reason is subject to factual dispute." Pet. App. at 4a (emphasis added). That burden requires the Company to disprove an essential element of Respondent's case, i.e., that the employer's proffered reasons were a pretext for discrimination, in clear derogation of this Court's conclusion in *Celotex*.

In short, by placing too great a burden on the Company, the decison below effectively relieved Respondent of his own summary judgment burden. Respondent had to—but plainly did not—"make a showing sufficient to establish the existence of an element essential to [his] case." *Celotex Corp. v. Catrett*, 477 U.S. at 322. Because nothing in Rule 56 or this Court's decisions permits Respondent to escape "his own burden of producing . . . evidence that would support a jury verdict," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256, the decision below should be reversed.

B. The Court Below Erred In Finding That There Were Material Facts In Dispute.

To survive summary judgment, Respondent had to "come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. at 587 (emphasis in original). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 247-48 (emphasis in original). By concluding that summary judgment was inappropriate here based on evidence which—even if disputed—"could not lead a rational trier of fact to find for the nonmoving party," *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. at 587, the court below erred.

Although Faust indisputably spent some, though less than 25 percent, of his post-recall time doing sales and office work for which Respondent was neither experienced nor trained, the Third Circuit apparently found a disputed material fact in conflicting inferences that could be drawn from that evidence. Whatever inferences may be drawn, however, are not material to the ultimate issue of discrimination. What Faust did after recall is immaterial to the Company's intent when it decided—a year earlier—to retain a multi-skilled employee instead of an employee with less diverse skills. Indeed, had Faust performed installation work for 100 percent, rather than 75 percent, of his time after recall, that fact—without more—would not be sufficiently probative of whether the Company intentionally discriminated against Respondent because of his age in 1982. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249-50 (if the evidence presented "is not significantly probative . . . summary judgment may be granted").[15]

In short, the "dispute" in this case did not concern "facts that might affect the outcome of the suit under the governing law". *Id.* at 248. Respondent's complete failure to adduce evidence concerning the essential element of his case—discrimination on the basis of age—necessarily renders evidence as to how Faust spent his time after recall immaterial. *Celotex Corp. v. Catrett*, 477 U.S. at 323. Thus, viewing "the record taken as a whole"—as the court below was required to do—no "ra-

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[15] If anything, the undisputed fact that the Company utilized Faust's diverse skills to some degree after recall supports, rather than contradicts, the Company's principal reason for retaining and recalling him.

tional trier of fact [could] find for [Respondent]" on his age discrimination claim. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. at 587. The court's failure properly to assess the record requires reversal here.

C. The Decision Below Conflicts With The Policies Underlying Rule 56.

The standard applied by the court below cannot be reconciled with the policies underlying Rule 56 because it eliminates, in large measure, summary judgment in age discrimination cases. *See Treese v. Chevron Corp.*, 666 F. Supp. 76 (W.D. Pa. 1987) (noting that summary judgment in an age discrimination case "is now nearly impossible" in the Third Circuit), *aff'd without opinion*, —— F.2d —— (3d Cir. March 24, 1988). Because "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole . . . ," *Celotex Corp. v. Catrett*, 477 U.S. at 327, the decision below should not stand.

An ADEA plaintiff is unquestionably entitled to a jury trial on any disputed material issue of fact. 29 U.S.C. § 626(c)(2) (1982); *see also Lorillard v. Pons*, 434 U.S. 575, 585 (1978). But "Rule 56 must be construed with due regard . . . for the rights of persons opposing [a plaintiff's] claims . . . to demonstrate in the manner provided by the Rule, prior to trial, that the claims . . . have no factual basis." *Celotex Corp. v. Catrett*, 477 U.S. at 327. Summary judgment, therefore, serves a crucial function in age discrimination cases: it isolates factually unsupportable claims and "prevent[s them] from going to trial with the attendant unwarranted consumption of public and private resources." *Id.*

The decision below greatly undermines this function. By permitting Respondent to present his case to a jury without showing factual support for his case, it endorses

the "unwarranted consumption" of resources that Rule 56 was designed to forestall. Because many courts, like the court below, are now reluctant to grant summary judgment in employment discrimination cases, more employment-related civil rights cases—over 15 percent—went to trial during the twelve-month period ending June 30, 1986 than any other category of federal question and diversity cases. Over one-third of these trials were before a jury.[16]

Judicial resources have been—and, if the decision below stands, will increasingly be—expended unnecessarily on factually unsupportable employment discrimination claims.[17] Faced with appeals and post-trial motions for judgment notwithstanding the verdict, the federal courts have frequently overturned jury verdicts in ADEA cases.[18] This fact suggests, at the least, that many such cases should not have been submitted to a jury. *Cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 251 ("The Court has said that summary judgment should be granted

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[16] Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts (1986), Table C-4 (at 206).

[17] Thus, even courts that recognize the futility of trial, given the absence of adequate evidence of discrimination, have nonetheless declined to grant summary judgment. *See Thornbrough v. Columbus & Greenville Railroad Co.*, 760 F.2d at 646 n.22 (court refused to grant summary judgment despite the "sparseness of proof"; employee alleged only that younger employees were retained and hired and pointed to no circumstantial evidence supporting his claim).

[18] *See, e.g., Simpson v. Midland-Ross Corp.*, 823 F.2d 937 (6th Cir. 1987) (reversing district court's denial of employer's motion for j.n.o.v.); *Wilkins v. Eaton Corp.*, 790 F.2d 515 (6th Cir.) (same), *reh'g denied*, 797 F.2d 342 (6th Cir. 1986); *Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312 (5th Cir. 1986) (same); *Chappell v. GTE Products Corp.*, 803 F.2d 261 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 1375 (1987) (affirming j.n.o.v.); *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405 (7th Cir. 1984) (same).

where the evidence is such that it 'would require a directed verdict for the moving party' ").

In short, the summary judgment standard established by the court below strikes an improper balance between the purposes underlying the ADEA and Rule 56. Only by requiring ADEA plaintiffs, faced with summary judgment, to produce evidence establishing an inferential link between an employment decision and age discrimination can this Court restore summary judgment procedure to its proper role in employment discrimination litigation. Respondent's failure to forge that critical link requires reversal here.

CONCLUSION

For the reasons set forth above, the judgment below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HARBISON-WALKER REFRACTORIES,
A Division of Dresser Industries, Inc.,

Petitioner,

v.

EUGENE F. BRIECK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does the record in this case present genuine issues of material fact regarding respondent's claim of unlawful discrimination?

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No. 87-271

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

HARBISON-WALKER REFRACTORIES,
A Division of Dresser Industries,
Inc.,

Petitioner,

v.

EUGENE F. BRIECK,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Section 4(a)(1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1) provides in pertinent part:

> It shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age....

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

The petitioner in this case is a manufacturer of specialized ceramic brick products which are sold primarily to steel producers. From 1965 until the early summer of 1982 respondent Eugene Brieck was employed by the firm as an installation specialist. In July of 1982, faced with a substantial decline in its

sales, Harbison-Walker began to reduce the workforce in the Iron and Steel Marketing Group in which respondent worked. Although Brieck, then aged 55, was the most senior installation specialist, and one of the more senior members of the entire group, he was the very first employee laid off. (Pet. App. 17a-18a; J.A. 31, 33) Brieck had 17 years of experience as a an installation specialist, compared to only 3 years of experience, some or all of it devoted to on the job training, for H.L. Faust, the youngest installation specialist. (J.A. 33, 50, 152-54) During July, 1982, Harbison-Walker laid off 7 of the group's 33 employees, including 3 of the 5 employees who were then 55 or older. Among the company's installation specialists, all of the employees over 40 -- the age group protected by ADEA -- were

laid off in July. (J.A. 31-33). The remaining installation specialist, H.J. Faust, then 39, was retained until November of 1982; in the summer of 1983 Faust was recalled to a permanent position as an installation specialist. (J.A. 135, 159) Harbison-Walker never offered either that or any other position to respondent after he was laid off.

On July 19, 1982, respondent filed with the Pennsylvania Human Relations Commission an administrative charge alleging that he had been laid off because of his age. (J.A. 6). On June 29, 1984, Brieck brought this action against Harbison-Walker,[1] alleging that the

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[1] Brieck also asserted a state law claim for breach of contract and for intentional infliction of emotional distress. (Complaint, ¶¶ 21-33). The Third Circuit upheld the dismissal of those claims (Pet. App. 17a-20a), and respondent did not seek review of that dismissal by this Court.

company had terminated and failed to recall him because of his age, in violation of the ADEA, and requesting a jury trial. (J.A. 2-7). After discovery was completed, the company filed a motion for summary judgment. The company did not, of course, deny that there was a dispute regarding whether it had engaged in intentional discrimination, or that that dispute was material to Brieck's ADEA claim; it contended, however, that the dispute regarding this material fact was not "genuine" because there was no evidence to support Brieck's allegation. Brieck opposed this motion. Both petitioner and respondent relied in the district court on depositions that had been taken, and documents which had been produced during the course of discovery, as well as on affidavits submitted in connection with the disputed motion.

The district court granted the motion for summary judgment on December 19, 1985. (Pet. App. 12a-21a). The district judge did not purport to find that no reasonable jury could return a verdict for Brieck, and did not refer to the fact that a jury trial had been requested. Rather, the judge apparently proceeded on the assumption that, if the subsidiary facts were clear, the court's responsibility was to decide what inferences ought to be drawn from those facts, and thus to itself dispose the case on the merits. In granting summary judgment regarding Brieck's ADEA claim, the district judge wrote:

> Any question about ... how Faust spends his time edges into an area of scrutiny of business decisions, which is not part of our function. We ... consider it plausible that the importance of an employee's related experience, whether or not applied, increases under the scaled-down business operations

> which in fact existed. Without considering age, we find that Mr. Brieck, in comparison to Faust, has
>
> 1. slightly more seniority;
>
> 2. slightly poorer performance evaluations;
>
> 3. little experience in areas [un]related to installation specialist.
>
> We thus cannot find that age was a determinative factor in the decision to lay off Mr. Brieck. Other facts support this finding.[2]

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[2] Pet. App. 17a. (emphasis added) The district court's treatment of Brieck's state law claims reflected this same approach. In rejecting Brieck's breach of contract claim, the court explained:

> "Viewing d[efen]dant's statements most favorably to plaintiffs, they do not establish violation of a contract.... We find [Brieck's] evidence insufficient to satisfy the requirement for a provision setting the length of the contract.... Mr. Brieck ... has not established the form of a contract which supports his claim."

(Pet. App.18a-19a) (emphasis added). The district court's discussion of the claim

The third circuit correctly criticized the district judge for having undertaken to decide what inferences should be drawn from the evidence (Pet. App. 5a-6a), and petitioner does not in this Court rely on the trial judge's "findings". On October 2, 1986, the third circuit reversed the award of summary judgment, and remanded the ADEA claim for trial; one member of the appellate panel dissented from the

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of Mr. Brieck and his wife for tortious infliction of emotional distress is similar in tone:

> "[W]e find that defendant's conduct in no way rises to the level of outrageousness necessary to invoke these theories.... [W]e conclude that the plaintiff clearly has not shown that defendant's conduct meets the test of extremeness required by this theory. Our finding necessarily precludes Mrs. Brieck's claim of negligent infliction of emotional distress based on defendant's same actions."

(Pet. App. 19a-20a)

decision to permit a trial of the ADEA claim.[3] (Pet. App. 1a-11a)

SUMMARY OF ARGUMENT

This appeal presents a classic case of the type of sharply conflicting evidence which must be evaluated by the ultimate trier of fact, and which cannot be resolved by means of summary judgment

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[3] Judge Weiss' dissenting opinion is based on a number of material misunderstandings regarding the evidence in this case. Judge Weiss believed Brieck was the second installation specialist to be laid off (Pet. App. 8a); in fact Brieck was the first. (J.A. 33) Judge Weiss assumed that, when Faust was rehired, another over-40 installation specialist, E.G. Malarich, was still interested in the position, and was the more likely victim of any age discrimination (Pet. App. 9a); in fact Malarich had by then taken early retirement. (J.A. 123-25) Most importantly, Judge Weiss thought Faust had testified that he spent 75% of his time, after being recalled, on installation work, with the remaining 25% devoted to non-installation tasks (Pet. App. 10a); in fact Faust testified that he spent "at least" 75% of his time doing installation work on the road, and that much of his remaining time was devoted to installation related work, such as filling out reports, back at the office. (J.A. 160).

for either party. Petitioner's brief cogently depicts the evidence and inferences most favorable to the employer, but omits mention of most of the at least equally persuasive evidence adduced by the respondent. A more thorough review of the depositions, affidavits and documents reveals stark and plainly material conflicts in the evidence regarding the qualifications of respondent, the circumstances under which he was laid off, and the qualifications and experience of the younger worker who was retained in his stead. The record also indicates that company officials have over the years offered widely varying explanations of their decision to lay off respondent, a discrepancy which a trier of fact might fairly regard as probative evidence of discrimination.

Petitioner insists it is entitled to summary judgment because it adduced sworn statements by company executives insisting that they acted with no unlawful motive in deciding to lay off respondent. But Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), makes clear that a finder of fact may reject such protestations of innocence if it finds them "unworthy of credence." 450 U.S. at 256. Questions of credibility cannot be resolved on summary judgment, but must be determined by the trier of fact after observing the demeanor of the witness during direct and cross-examination. See Anderson v. Bessemer City, 470 U.S.564, 575 (1985). A dispute about a claim of intentional discrimination, like any question regarding the state of mind of an individual, "does not readily lend itself

to summary disposition." Hutchinson v. Proxmire, 443 U.S. 111, 120 n. 9 (1979).

This case was ready for trial in the summer of 1985. Instead of a trial that would have lasted no more than a few days, over three years have been consumed debating the strength and nuances of the evidence. The efficient administration of justice would have been far better served in this case if the district court had exercised its discretion to defer passing on petitioner's challenge to the sufficiency of the evidence until a jury had returned a verdict in the case.

ARGUMENT

I. THE RECORD PRESENTS GENUINE ISSUES OF MATERIAL FACT

This appeal presents a classic example of the type of conflicting evidence and inferences which must be referred for resolution by a jury or other trier of fact. If the instant controversy

had been tried on the merits, and were somehow before this Court for de novo reconsideration, it would fairly be regarded as presenting a close case. As we set out in detail below, the record in this proceeding contains not only evidence supporting quite inconsistent inferences, but also square conflicts in the testimony regarding several material issues; reasonable persons might well disagree as to how those conflicts ought to be resolved. Had this case been tried before a jury, and a verdict returned in favor of the petitioner, we would be hard pressed to overturn such a verdict on appeal; the record undeniably contains substantial evidence supporting the contentions of the petitioner, and petitioner's brief cogently summarizes those portions of that record most favorable to it and sets forth with considerable force the inferences

that might conceivably have been drawn from those selected portions of the record.

In the present procedural posture of this case, however, the issue is not whether a jury verdict in favor of petitioner could be sustained on appeal, but whether a jury should be permitted to consider the merits of the underlying controversy. Petitioner describes the record in this case in terms which, if accurate, might well support an order of summary judgment. Thus petitioner asserts that the critical facts were either "undisputed"[4] or "conceded,"[5] and repeatedly insists that respondent had literally adduced "no" evidence whatever

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[4] Pet. Br. 6, 15 n. 8, 23 n. 15.

[5] Pet. Br. 6, 16.

of an unlawful discriminatory motive.[6] The actual record before the Court, we

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[6] Pet. Br. i (respondent failed to present "any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate"), 6 ("Respondent failed to produce any evidence that the Company's proffered business reasons were a pretext for age discrimination"), "8 ("respondent ... produced no evidence -- other than the age differential between him and Faust--linking the company's decision to age"), 11 ("Respondent offered no evidence that age played ... a role in the decision), 11 ("plaintiff has produced no direct or indirect evidence of age discrimination)," 16 ("Respondent produced no direct evidence that Harbison-Walker's decision was motivated by age discrimination. Nor did he present any indirect evidence..."), 17 ("Respondent presented no specific facts, beyond the fact that the laid-off installation specialists were older than Faust, to demonstrate that the company's articulated reasons were pretextual"), 18 ("Respondent failed completely to forge any link between the challenged decision and age discrimination"), 21 ("complete absence of record evidence to support a finding of age discrimination"), 23 ("Respondent's complete failure to adduce evidence concerning the essential element of his case -- discrimination on the basis of age...."), 24 (respondent lacked any "factual support for his case").

suggest, cannot fairly support this characterization.

In the instant case, as in Furnco Construction Corp. v Waters, 438 U.S. 567, 569 (1978), "[a] few facts ... are not in dispute." For some 17 years prior to June, 1982, respondent was an employee of petitioner Harbison-Walker, a diversified company whose activities include the manufacturing and sale of ceramic brick for use in industrial furnaces. Throughout this period respondent held the position of installation specialist; as of the spring of 1982 there were a total of four installation specialists in petitioner's Pittsburgh office, respondent (age 55), W. L. Meixell (59), Al Malarich (59), and Hugh Faust (39).[7] (J.A. 31, 33)

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[7] Some portions of the record describe the position held by Meixell not as installation specialist but as "senior installation specialist." Defendant's Response to Plaintiff's First Set of Interrogatories Directed to Defendant, Appendix A. If Meixell held a position different and indeed higher than Faust, the decision to retain Faust and lay off Meixell might well be interpreted by a jury as evidence of a practice of age discrimination.

Brieck was laid off by petitioner on July 2, 1982; petitioner subsequently laid off Meixell (July 9, 1982), Malarich (July 30, 1982), and last of all, Faust (November 18, 1982). (J.A. 33). The next year Faust was rehired[8] as a permanent employee, which he evidently remains to this day. (J.A. 149). Petitioner conceded that it had given no consideration to rehiring respondent when the 1983 vacancy, ultimately awarded to

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[8] Technically laid off employees were on temporary furlough for the first nine months after leaving the company, after which the furlough became permanent. (J.A. 113-14). It is unclear from the record whether this nine month period had lapsed when Faust returned to work. At least one other laid off employee, aged 22, was recalled after the expiration of this nine month period. (J.A. 33, 114).

Faust, arose. (J.A. 125) The central issue in this case, is whether petitioner acted with an intent to discriminate against respondent because of his age when, in July of 1982, it laid off respondent while keeping Faust on the job, or in August of 1983, when it rehired Faust rather than respondent.

(A) The decisions below and petitioner understandably focus much of their discussion on the reasons given by the company for deciding to retain and rehire Faust rather than respondent. In its brief in this Court petitioner now asserts that Faust was selected because he had as of 1982-83 more diversified experience and training. (Pet. Br. 4, 5). The record reveals, however, that company officials have over the course of this controversy given widely varying accounts

of the basis on which the disputed decisions were made.

The earliest explanation of the criterion for selecting employees for layoff came from Ralph Ytterberg, Senior Vice President of Dresser Industries, petitioner's parent company, in a company newsletter dated "Spring 1982". Ytterberg announced that "Length of company service and skill requirements ... are the most important considerations". (J.A. 47). Ytterberg's statement is important because it evidently predates the decision to dismiss respondent. Although there is considerable dispute in this case regarding what skills were needed in respondent's unit after June of 1982, and regarding what skills respondent and Faust in fact possessed, there is no dispute that respondent had more company seniority

than any of the other installation specialists, including Faust.[9]

Respondent's supervisor, Larry Sheatsley, stated in his deposition that Faust had been retained over Meixell on the basis of seniority (J.A. 105), but all of the company managers questioned conceded that, despite Ytterberg's announcement, respondent's greater seniority had not been considered when he was laid off instead of Faust. John Nicolella, Harbison-Walker's manager of employee relations, asked to explain why the company had retained Faust rather than respondent, asserted that Faust had greater seniority than respondent (J.A.

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[9] The seniority dates of the installation specialists were as follows:

Brieck	June 1965
Malarich	August 1966
Faust	September 1966
Meixell	January 1980

J.A. 33.

132), a statement which petitioner now acknowledges was incorrect. (Pet. Br. 3). Sheatsley asserted that he premised his choice between petitioner and Faust on the assumption that they had "about the same years service with Harbison" (J.A. 105), a statement which a jury might find inconsistent with the 15 month difference in seniority, or with Ytterberg's announcement that seniority was an important consideration. Sheatsley's deposition testimony that he was aware of the seniority of each of the four installation specialists was seemingly contradicted by respondent's deposition which recounted that, in the course of telling Brieck he was being laid off, Sheatsley had professed surprise at learning that Brieck had more seniority than Faust. (J.A. 79). Finally, petitioner offered in support of its

motion for summary judgment an affidavit of William Sekeras, Sheatsley's supervisor, which contained his own account of the directions given to Sheatsley for selecting the employees to be laid off; the Sekeras affidavit contains no reference whatever to seniority as a consideration (J.A. 13), which seems less than fully consistent with Ytterberg's earlier announcement, or with the reasons given by Sheatsley for laying off Meixell rather than Faust.

On June 17, 1982, when the decision to lay off respondent had been made, at least tentatively, but had not yet been announced, company executive F. P. Shonkwiler addressed an internal memorandum to Nicolella explaining that respondent had been chosen for layoff because he was "our least qualified Installation Specialist and has limited

expertise". (J.A. 145). The most noteworthy fact about this contemporaneous internal explanation is what it does not contain, viz. any suggestion that the choice had been based on respondent's comparative ability to perform functions other than those of an installation specialist. In this Court, of course, petitioner offers a rather different explanation, insisting that the decision to lay off respondent rather than Faust was based on the need for an employee who could work on noninstallation tasks. Were the company still sticking with the explanation given by Shonkwiler in 1982, this case would certainly have to be referred by a jury, for there are direct and unequivocal conflicts in the testimony regarding the comparative skills of respondent and Faust as installation specialists. (See section I(B), infra).

The next occasion when the reasons for respondent's layoff were discussed was on July 2, 1982, when Sheatsley informed respondent that he was being furloughed. Respondent testified at his deposition that he had asked why he had been selected for layoff, and was given a seemingly evasive response:

> I says, "why me?"
> He says, "we got to start somewhere"
>
> * * *
>
> Then I asked him about these young kids. I said, "What about all these young kids?" And he just wouldn't say nothing. he just sort of shrugged his shoulders ... [T]he younger kids ... there was a dozen of them with less than maybe a year's service, if that much.

(J.A. 81; see also id. at 85). A jury might plausibly infer from Sheatsley's silence that he had as of June, 1982, no legitimate explanation to offer, and that the explanation which he gave in his 1985

deposition had been concocted in the interim. On the other hand, both Sheatsley and another supervisor in the room during this exchange stated in their depositions that they could not recall what questions respondent had asked, or what answers Sheatsley had given, regarding how the company had decided to lay off respondent rather than Faust or others. (J.A. 108, 122-23).[10]

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[10] Three days after he was laid off, respondent spoke by phone with the president of Harbison-Walker, Don Stocks, and directly complained that he had been laid off while far younger, and necessarily less senior, employees were retained:

> "A. I ... says, You are keeping all these kids, and your[sic] neglecting me.
>
> "Q. And what did he say to that?
>
> "A. He says, I can't interfere with the process." He says, "I am sorry. Goody[sic]."

(J.A. 83). A jury might have construed Stock's statement merely as a refusal to become involved in personnel matters, or

Respondent's objection to the retention of younger, less senior workers was aired again later in 1982 at a meeting at the office of the Pennsylvania Human Relations Commission, attended by respondent and by John Nicolella, the firm's personnel director. At his subsequent deposition respondent recounted that the following exchange had occurred at that meeting between himself and Nicolella:

> [A]t that meeting, I asked [Nicolella], "John," I says, "Why are you keeping these kids and getting rid of me?"
>
> He says, "Gene, these kids are going to be our future managers." And that's all he said.

(J.A. 83). Nicolella's remark could conceivably be construed in more than one way; but a jury might plausibly interpret

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as a deliberately evasive response to an inquiry for which he knew there was no legitimate response.

his statement as expressing a preference for retaining younger employees who, unlike workers such as respondent in their fifties, would still be with the company many years in the future.

There were seeming inconsistencies in the statements made by company officials regarding whether differences in the performance ratings of respondent and Faust had played a role in the critical decision. Nicolella flatly asserted that ratings differences had "come into play." (J.A. 133, 134). Sheatsley, who was responsible for the initial recommendation to lay off respondent rather than Faust, made no reference whatever to having considered ratings, but based his explanation solely on alleged differences in the experiences of respondent and Faust outside the area of installation work. (J.A. 105-06). Sheatsley's, supervisor,

William Sekeras, submitted a deposition taking an intermediate or possibly equivocal position, asserting that diversity of experience was "[t]he principal reason underlying Faust's retention", but then adding, "Also, Faust had slightly higher performance ratings than Brieck". (J.A. 14-15). Nicolella asserted in his 1985 deposition that "Mr. Faust is rated higher than Mr. Brieck" (J.A. 133); but the 1982 memorandum on the basis of which Nicolella approved respondent's layoff asserted that he and Faust had the same rating. (J.A. 147-48). Malarich undeniably had a higher rating than Faust (J.A. 148), but none of the Harbison-Walker executives offered any account of why this had not helped Malarich when he was laid off, and Faust retained, several weeks after respondent lost his job.

Finally, in his July, 1985, affidavit Sekeras offered an entirely new explanation of the retention of Faust rather than Brieck, asserting that Faust had a unique expertise regarding a particular important type of brick installation:

> Faust was the only installation specialist who had experience in installation work in blast furnace casthouses, an area that had been targeted by Harbison-Walker as a growth market and an area that represented significant potential even during the 1982 period.

(J.A. 14). Had this explanation been offered in June or July 1982, when Brieck was first laid off, it might well have carried considerable weight, and it is of course possible that a jury might yet credit it at trial. But the timing of this new explanation might well lead a jury to a very different conclusion. At his March 1985 deposition Larry Sheatsley,

who initially selected Brieck for layoff, although repeatedly asked why Faust was retained, made no reference whatever to blast furnace casthouses, either as an area of differing expertise or as having any importance to the company. (J.A. 104-06, 111-12). Similarly Harbison-Walker's personnel manager, John Nicolella, was repeatedly asked at his, May 1985 deposition, the reasons for Faust's retention, and he too made no reference to blast furnace casthouses. (J.A. 131-32). Only in July of 1985, after the completion of discovery, did the company produce a witness to offer this new explanation.

We do not contend that any rational jury would necessarily see in these ever-shifting explanations decisive proof of invidious discrimination. It is at least conceivable that counsel for the company could persuade a jury that these apparent

inconsistencies were merely the result of a series of misunderstandings -- that Sheatsley, Sekeras, Nicolella and Shonkwiler simply had completely different reasons for arriving coincidentally at the same conclusion that Brieck should be laid off, that Sheatsley and Nicolella made a bona fide mistake in not realizing that Brieck had more seniority than Faust, and that Nicolella never read Shonkwiler's memorandum of June 17, 1982. But surely a reasonable jury could draw from these divergent accounts a very different conclusion, that Brieck was in fact selected for lay off because of his age, and that from 1982 to 1985 Harbison-Walker's supervisors concocted a series of explanations in search of a purported

justification with a patina of plausibility.[11]

(B) Varying testimony about the reasons for laying off respondent rather than Faust would be sufficient to defeat the motion for summary judgment, even if there were no dispute about differences in the qualifications of respondent and Faust. In fact, however, such disputes abound, and in most instances are the result of direct conflicts in the evidence.

In his 1985 deposition Sekeras asserted that the ratings of Faust and Brieck were as follows:

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11 The lower courts have repeatedly recognized that such a shifting explanation of an employer's conduct is probative evidence of the existence of a discriminatory motive. Schmitz v. St. Regis Paper Co., 811 F.2d 131, 133 (2d Cir. 1987); Kilgo v. Bowman Transp. Co., 789 F.2d 859, 875 (11th Cir. 1986).

	Brieck	Faust
1981	3	3
1980	2	3
1979	2	3
1978	3	4

(J.A. 15). Under the Harbison-Walker rating system a "3" means "fully satisfactory". (J.A. 133, 161). Brieck's supervisor during the years from 1978 to 1981, however, testified he never rated Brieck lower than fully satisfactory (J.A. 120), seemingly contradicting the 1979 and 1980 ratings in Sekeras' affidavit. The Sekeras' affidavit contains no ratings for 1982; an internal memorandum of that year, however, reveals that Brieck and Faust received the same rating in 1982. (J.A. 135, 146). The only uncontradicted difference in ratings is for 1978, some four years before the layoffs in question, a gap in time that seems inconsistent with the tense of Nicolella's 1985 deposition statement that "Mr. Faust is rated higher

than Mr. Brieck." (J.A. 133) (emphasis added). In addition, Faust testified that he did not become an installation specialist until 1978 or 1979 (J.A. 152-53), which suggests that his 1978 rating of "4" was in all probability a rating for a job different than that which was at issue in the 1982 layoffs.[12] Even Sekeras asserted only that there were differences in ratings in 1980 and earlier years (J.A. 15); the contemporaneous June, 1982, memorandum discussing the decision to lay off Brieck rather than Faust, however, cited only their 1981 and 1982 ratings, suggesting that older possibly unequal ratings were not considered when the 1982

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[12] The relevance of such out-of-date ratings to the 1982 layoff decisions is further called into question by the fact that, only a few months before he was laid off, Brieck had been awarded a raise and a letter of commendation. (J.A. 4, 51, 75). The company offered no evidence that Faust's work had been lauded or rewarded in this manner.

decision was made. (J.A. 146). In August, 1982, in a written explanation of the decision to retain Faust, the company asserted to the Pennsylvania Human Rights Commission that Faust "has been rated very good to fully satisfactory in the last three years."[13] That assertion is flatly contradicted by the Sheatsley deposition and the company's internal memorandum of June 1982, which indicate that Faust had not received a "very good" (4) rating in any of the four prior years.

There was also a clear conflict in the evidence regarding Faust's comparative ability, indeed his competence, to do the work of an installation specialist, which remained the bulk of his duties both in 1982 and after he was rehired in 1983. Sekeras, of course, asserted in his

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[13] Deposition Exhibit 7, Deposition of John Nicolella.

affidavit that only Faust had experience with blast furnace casthouses. (J.A. 14). Brieck, on the other hand, asserted in his deposition that Faust was little more than a trainee who had never worked on an installation job on his own, but always did so in the company of one of the other installation specialists. (J.A. 68-69; see also id. at 52). If Brieck was correct, Sekeras' affidavit was necessarily wrong, for Faust could not have had unique experience regarding casthouses or anything else if all his installation experience had been acquired in concert with another specialist. Indeed, Brieck's account, if credited by a jury, would strongly suggest that Faust was the least competent employee to do the specialist work which remained the core of his position. Brieck's deposition, on the other hand, was directly contradicted by

Faust, who stated in his deposition that he had been sent out on his own. (J.A. 155). Faust's deposition testimony regarding his experience with casthouse installations was somewhat opaque, apparently referring only to the period after the July 1982 layoffs, and not explaining clearly what work he had done in this area. (J.A. 150).

There was conflicting evidence, as well, regarding Brieck's experience and abilities. In an affidavit submitted in response to the motion for summary judgment, Brieck asserted he was the only one of the four installation specialists who had ever worked on international assignments,[14] which constituted an important segment of the firm's business.

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[14] J.A. 51 ("I was the only one of the four installation specialists in the Iron and Steel Marketing Group who had been sent out on international installation assignments").

(J.A. 18). On the other hand, Sheatsley asserted in his deposition that others had worked overseas, although it is somewhat unclear whether Sheatsley was referring to other installation specialists, and there is no suggestion that Faust had ever worked on overseas projects.[15] Nicollela asserted that Faust was retained rather than his older colleagues because those other installation specialists, Brieck included, could not do any thing except "just supervise the installation of brick in a steel mill". (J.A. 132). Nicollela's contentions were squarely disputed by

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15 J.A. 102:

"Q: Were other individuals sent on Overseas' assignments, or was it most likely Mr. Brieck who would be doing that in terms of the Installation Specialists in the Iron & Steel Market?

"A: I'll say I'm aware that others were sent on installation assignments Overseas besides Mr. Brieck. Specifically who and when, I'd have to go back and check."

Brieck's affidavit and deposition, which asserted that Brieck had extensive experience in preparing reports and surveys (J.A. 52, 62), technical drawings (J.A. 52, 63) and marketing analyses (J.A. 63), in analyzing technical problems which customers were experiencing with their furnaces (J.A. 60, 63), in designing the masonry interiors of blast furnaces (J.A. 61), and in pricing and sales. (J.A. 52, 58).

There was similar disagreements about the nature of Faust's experience outside the area of installation. Sekeras and Sheatsley broadly characterized Faust's office work as administrative. (J.A. 15, 105). Faust's deposition, however, suggested that, aside from preparing certain essentially clerical calculations and correspondence, his position was that of "gofer":

A. I usually do a lot of things that people just tell me to do. Like a car needs fixed, got something out at advertising that we need. Whatever. Even drove a forklift down the warehouse one time.

Q. So if somebody had to go for something, you might have to do that?

A. Not have to, I would be asked nicely to do it. I would volunteer.

Q. Excuse me for degrading your role, but would part of your job be to be a gofer?

A. Sure. I don't mind doing that. It's something different.

Q. I'm not saying anything bad about it, but part of your job was to be the officer handyman?

A. Yeah. That was part of being staff correspondent.

(J.A. 156-57). Sekeras asserted Faust had had "considerable contact in customer relations" (J.A. 14), and in this Court petitioner describes Faust's experience as "marketing" and "sales". (Pet. Br. 6, 7, 23). In his deposition, however, Faust

conceded that his work as an "assistant correspondent" was largely limited to processing written orders:

Q. Were you involved in sales at all or was your job more or less to support the sales staff?

A. Support the sales staff, but I did have direct contact with customers. On the phone. Phone contact.

Q. What percentage of your time was spent in the office when you were a correspondent?

A. One hundred percent....

Q. Had you ever been involved in sales in any respect during your employment with Harbison-Walker?

A. No, but we feel like we are a part of sales. Staff support.

Q. You support the sales, but you yourself were never performing an actual sales function yourself?

A. No....

(J.A. 152-55). In a September 1982 response to a request for information from the Pennsylvania Human Relations

Commission, petitioner asserted that Faust's job duties included helping to "make engineering sketches and technical preparation and proposals." (J.A. 147).[16] In his deposition Brieck squarely asserted that Faust neither did nor had the ability to do any technical work or sketches (J.A. 68-69), and Faust's description of his own experience at Harbison-Walker makes no mention of any such experience or ability. (J.A. 149-60).

There is no dispute that Faust's experience at Harbison-Walker included two positions which Brieck never held--assistant sales correspondent and staff correspondent. (J.A. 151-53). What is

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[16] In a letter to the Commission dated August 2, 1982, the company explained that it had retained Faust because he possessed "multidisciplinary skills in engineering." Deposition Exhibit No. 7, Deposition of John Nicolella. This explanation also seems inconsistent with the depositions of Faust and Brieck.

very much at issue, and far from clear from the present record, is what Faust actually did in those positions. Petitioner suggests that Faust was a marketing expert and administrator, with refined skills and broad experiences, while Brieck was merely a bricklayer. While the record is not utterly devoid of evidence to buttress that contention, the record seems on balance to provide greater support for a very different conclusion, that Faust was little more than a glorified gofer, less than fully qualified even to do the work of an installation specialist, and possessed only of rudimentary office skills which a person of ordinary ability could master in a few days. (J.A. 52-53, 68, 149-60).

(C) There are a number of important areas in which the underlying facts are undisputed, but regarding which very

different inferences could reasonably be drawn. Petitioner offered in support of its motion a statistical analysis purporting to demonstrate that it could not have acted with any discriminatory motive. That analysis indicates that among the Marketing Group employees 40 and over only 21% were laid off, compared to 47% of the employees under 40.[17] However, if one examines the comparative treatment of the oldest employees a different picture emerges; in July of 1982 petitioner laid off 60% of the employees

[17] J.A. 31-33. Petitioner laid off 3 of 14 employees 40 and over, and 9 of the 19 employees under 40. For reasons which are not apparent on the face of the record, the list of laid-off employees annexed to the July, 1985, affidavit of Sekeras contains less than half the names set forth in a list of laid-off employees provided by the company in January, 1985. Defendant's Response to Plaintiff's First Set of Interrogatories Directed to Defendant, Appendices A and B. The analysis in this note and the accompanying text is based on the lists attached to the Sekeras affidavit.

55 and older, but only 14% of the employees under 55.[18] In either event the sample size is small, and the evidentiary weight of the statistics thus limited, but a jury might plausibly draw from the underlying data either of two very different conclusions.

The fact that almost half of the employees laid off in July, 1982, were over 55, in a unit where only 15% of the workers were that old, was a result of Harbison-Walker's decision to concentrate the initial layoffs on installation specialists, the position in which most of its oldest workers were to be found. Thus in the July layoffs the company furloughed 3 of the 4 installation specialists, but only 1 of the 7 product specialists. A reasonable jury could draw different

[18] Id. Petitioner laid off in July 3 of the 5 employees 55 and over, and only 4 of the 28 employees under 55.

conclusions from the record regarding why this occurred. Sheatsley suggested that the decline in the need for employees was particularly great in the case of installation specialists,[19] a statement which, if credited by a jury, could provide a legitimate explanation for the disproportionately large number of installation specialists laid off. On the other hand, immediately after 2 of the 4 installation specialists, aged 55 and 59, were laid off, Sekeras announced that there was now a shortage of installation specialists and that other employees would as a consequence have to do installation work.[20] Sheatsley acknowledged that,

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19 J.A. 105 ("assistance in the installation of our refractories was definitely less needed, that was a prime consideration").

20 J.A. 118 ("The heaviest impact ... was in our Marketing Support Group which will seriously reduce our capability from Pittsburgh to follow installations

after the older installation specialists were laid off, it became necessary to direct almost all the other employees in the Marketing Support Group to do installation work.[21] A reasonable jury

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.... Sales people will be required to ... follow installations as required.... I ... expect each of you to take additional roles and responsibilities to help fill the gaps.... This means you may be required to ... even follow installations....")

21 J.A. 110:

"Q. Of those 32 that remained after the temporary furlough of the first 6, how many of those 32 actually, in fact, helped in doing Installation Specialist work in the months after then?

"A. I wouldn't be able to say specifically, but the majority or nearly all or perhaps all of the remaining non-clerical personnel with the possible exception of Don Jamison and myself. So the various Product Managers, the various Product Specialists and Product Analysts would have all contributed in this installation service area.

"Q. They would actually go on the job site?

might infer from this evidence that the decision to concentrate the layoffs on installation specialists was the result, not of a particularly severe decline in installation work, but of some entirely extraneous consideration, such as a desire to remove employees in their fifties.

The decision to retain Faust alone from among the installation specialists was explained by Sekeras as being a result of the need for someone with Faust's experience as a sales correspondent. (J.A. 14). Yet on August 2, 1982, only 3 days after Harbison-Walker had laid off the last of the installation specialists over 40, the company laid off the only sales correspondent in the unit. (J.A. 33). A jury might well infer from that action that the skills of a sales

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"A. Correct."

correspondent were not in fact needed by the company at all.

Sekeras insisted that Faust was retained and rehired, rather than Brieck, because Faust's "administration and sales correspondent experience permitted him to perform other noninstallation functions in the reduced department". (J.A. 15). The company's entire argument necessarily rests on the premise, at least implicit in Sekeras' statement, that company officials in fact believed that whichever installation specialist was retained, and later rehired, would in fact be performing a significant amount of "noninstallation functions". Faust's deposition, however, revealed that in fact he spent virtually all of his time on installation work. When asked what he did in July 1982, Faust

mentioned only installation work,[22] and Faust acknowledged that since being rehired in 1983 he had spent almost all his time on installation activities.[23]

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22 J.A. 149-50:

"Q. Could you describe for me what your duties were in July of 1982"

"A. I was assigned to the -- I was in the iron and steel department. I was assigned to work with Stan Pavlica on blast furnace projects and installations....

"Q. What were your duties when you worked with Mr. Pavlica?

"A. I went out on blast furnace installations."

23 J.A. 160:

"Q. Since coming back in August of '83, what has been the percentage of time you would spend on the job -- on the road as an installation specialist?

"A. 75, I guess, at least.

"Q. When you were involved in duties that aren't actual installations, what duties do you perform now, or what duties

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have you performed from August of '83 to the present date that have not been installation duties?

"A. Pretty much been related to that -- I write reports of the installation. Have to have time to come into the office to do that. I've also still done some work with the blast furnace group working on margins again. Doing some filing. Not much anymore. It's just piling up. But I still -

"Q. You do work with the blast furnace group?

"A. Right.

"Q. You do filing, and what was the other thing you said?

"A. Margins. Also some gofer work like getting drawings out to the works, to salesmen.

"Q. When you write reports of installations, any installation specialist would have to do that?

"A. Yes.

"Q. Even someone like Mr. Brieck--someone like Mr. Brieck in his old duties would have had to fill out reports regarding

As the third circuit properly recognized, Faust's description of his actual duties "raise a question of fact as to whether the employer really believed that Faust's 'varied' experience made him more qualified than Brieck to perform the job functions remaining in the reduced business environment." (Pet. App. 5a). The company offered in support of its motion for summary judgment no evidence purporting to explain this apparent discrepancy between the concerns which allegedly led it to retain and rehire Faust, and the work which Faust actually performed. In its brief in this Court the

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installations he had been involved in?

"A. Correct....

"Q. What percentage of your time since August of '83 has been spent doing margins? Very small percentage?

"A. Small percentages [sic], yes."

company seems to suggest that the discrepancy was merely the result of an innocent error, that the company officials believed in good faith, albeit mistakenly, that the employee in the position in which Faust was retained, and subsequently rehired, would be spending a large portion of his time on noninstallation work requiring the past experience of a sales correspondent. (Pet. Br. 20, 23). A jury could conceivably interpret the evidence in that way, but it would surely be reasonable for a jury to infer from what Faust actually did after the July, 1982, layoff that the real reason for the decisions to retain and rehire Faust was something other than his sales correspondent experience.

The instant case, in sum, is a classic example of the type of dispute which cannot be resolved, for either

party, by summary judgment, but must be submitted for resolution by the trier of fact, be it a judge or a jury. Genuine disputes about material facts are not merely present, they abound. This is not merely a situation in which a trial is required to resolve conflicts between the statements of the plaintiff and those of the defendant's officials; here a trial is necessary to resolve the conflicts among the statements of the company officials themselves. As petitioner's brief well illustrates, a jury which believed only the evidence, and drew only the inferences, most favorable to the company, might return a verdict for Harbison-Walker. But the contention on which petitioner's demand for summary judgment is grounded -- that "viewing 'the record as a whole' ... no 'rational trier of fact [could] find for [Respondent]' on his age

discrimination claim," (Pet. Br. 23-24) -- simply cannot be sustained.

III. THE DENIAL OF SUMMARY JUDGMENT IS CONSISTENT WITH RULE 56 AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT

In view of the actual state of the record in this case, it is abundantly clear that summary judgment could not properly be awarded to petitioner. Proceeding on the basis of its assertion that this is a case in which there is literally no evidence of unlawful discrimination, petitioner argues that the decision of the third circuit must be based on some misconception as to the applicable legal principles. In light of the actual record, the legal issues briefed by petitioner do not appear to be presented by this case. Nonetheless, we set forth below the general principles applicable to a motion for summary

judgment, and then address briefly the specific arguments advanced by petitioner.

A. The Applicable Legal Standard

(i) Rule 56(c) of the Federal Rules of Civil Procedure authorizes the entry of summary judgment in a civil case if

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

"[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

> If ... the proofs fail to exclude all bases on which judgment might be rendered in favor of the person against whom the motion is made, summary judgment must be denied. And

> this would be true whether the issue is one of disputed fact or a question of how the trier would characterize admitted facts (e.g. as constituting negligence or the reverse). The device is not intended to resolve issues that are within the traditional province of the trier of fact, but rather to see whether there are such issues.

F. James and G. Hazard, Civil Procedure, 273 (2d ed. 1977) (footnotes omitted). The burden of persuasion is on the moving party, and that burden is a stringent one; any doubts as to the existence of a genuine issue for trial must be resolved against the party seeking summary judgment. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970).[24] It may be

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[24] One authoritative commentator suggests that the procedures established by Rule 56 have in some instances been abused. 10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure § 2712, pp. 582-83 (1983). A motion for summary judgment, like any other motion, must be based on a reasoned belief that it is well grounded in fact and warranted by existing law. See Rule 11, F.R.C.P.

of considerable importance whether a given case, if it went to trial, would be heard by a judge or a jury.

> If the decision is to be reached by the court, and there are no issues of witness credibility, the court may conclude on the basis of the affidavits, depositions, and stipulations before it, that there are no genuine issues of material fact, even though decision may depend on inferences to be drawn from what has been incontrovertibly proved.... But where a jury is called for, the litigants are entitled to have the jury draw those inferences or conclusions that are appropriate grist for juries.

Nunez v. Superior Oil Co., 572 F.2d 1119, 1123-24 (5th Cir. 1978).

A motion for summary judgment also raises issues of a constitutional nature where, as here, the non-moving party has requested and would be entitled to have his claims resolved by a jury if the case went to trial. This Court's decision in Weinberger v. Hynson, Westcott & Dunning,

412 U.S. 609 (1973),[25] suggests that a different and more stringent standard should be applied where the effect of summary judgment would be to deny the jury trial requested by the non-moving party; at the least particularly great caution ought be exercised in deciding to grant summary judgment in such a case. Trial by deposition, like "[t]rial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" Poller v. Columbia Broadcasting Co., 368 U.S. 464, 473 (1962).

> The right to confront, cr ss-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases. The

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25 "If this were a case involving trial by jury as provided in the Seventh Amendment, there would be sharper limitations on the use of summary judgment." 412 U.S. at 621-22.

> advantage of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment.

Adickes v. S. H. Kress & Co., 398 U.S. 144, 176 (1970) (Black, J. concurring)[26]

If on a motion for summary judgment the moving party clearly establishes that it would be entitled to a directed verdict if the case went to trial, the court may, consistent with the Seventh Amendment, award judgment. But a court asked to grant summary judgment in a case that would otherwise be referred for a trial to a jury must bear in mind the stringent constitutional restrictions on the

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[26] In his dissenting opinion in First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 304 (1968), Justice Black expressed concern that "the summary judgment technique tempts judges to take over the jury trial of cases, thus depriving parties of their constitutional right to trial by jury".

authority of judges to impinge on the factfinding authority of juries, and be alert to any possibility that the record that would be presented at trial might differ from the record on which summary judgment is sought.

(ii) This Court admonished in Hutchinson v. Proxmire, 443 U.S. 111, 120 n. 9 (1979), that a question regarding the state of mind of an individual "does not readily lend itself to summary disposition."[27] That unavoidable

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[27] See also White Motor Co. v. United States, 372 U.S. 253, 259 (1963) ("[s]ummary judgments ... are not appropriate 'where motive and intent play leading roles'"); Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962) ("We believe that summary judgment procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot") (footnote omitted). The holding in Hutchinson is consistent with the practical judgment of the lower courts, which have repeatedly found summary judgment inappropriate in cases

limitation on the utility of summary judgment procedures arises for two distinct reasons. First, where the individual whose state of mind is at issue is still alive, and there is reason to believe that either party will call him to testify at trial, uncertainties about the demeanor and credibility of that witness will ordinarily preclude the granting of summary judgment. Because such a witness is the only person with personal knowledge of his or her own state of mind, a trier of fact is likely to rely very heavily on the credibility of that witness' testimony.

> [A] court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of state of mind.

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involving a dispute about the knowledge or state of mind of an individual. 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2730 (1983) (citing cases).

> Much depends on the credibility of the witnesses testifying as to their own states of mind. In these circumstances the jury should be given an opportunity to observe the demeanor, during direct and cross examination, of the witnesses whose states of mind are at issue.

Croley v. Matson Navigation Co., 434 F.2d 73, 77 (5th Cir. 1970). "[T]he manner of the [witness] while testifying is often times more indicative of the real character of his opinion than his words." Wainwright v. Witt, 469 U.S. 412, 428 n. 9 (1985). The certainty that no one else could directly contradict his testimony may lead such a witness to exaggerate or misrepresent his state of mind; if the witness is a party, or connected with a party to the proceeding, the dangers of relying on his statements at the summary judgment stage are particularly great.

Second, disputes regarding the state of mind of an individual frequently depend

on indirect and circumstantial evidence about whose significance reasonable people may well disagree. "[T]he question facing triers of fact in discrimination cases is both sensitive and difficult.... There will seldom be 'eyewitness' testimony as to the employer's mental process." U.S. Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711, 716 (1983). Where the difficulty in resolving a factual question is especially great, the possibility that a court will be able to conclude that there is no genuine issue about the proper resolution of that question is likely to be particularly small.

The admonition in Hutchinson exemplifies the broader problem that arises whenever summary judgment is sought in a case to which the demeanor of a witness might be relevant, or even critical. In any case of that sort a

judge asked to rule on a motion for summary judgment will ordinarily have no way of knowing the nature of the demeanor evidence that would be presented at trial.[28] The judge's avoidable ignorance regarding that evidence will not invariably be fatal to a motion for summary judgment. The existence of necessarily unknowable demeanor evidence, like the existence of unexamined documentary evidence, would bar the entry of summary judgment only if the nature of that evidence could alter the outcome of that case. There could, of course, be a case in which "cross examination of the

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[28] This limitation is analogous to the posture of an appellate court asked to review a cold record to determine the sufficiency of the evidence to support a decision made, at least in part, on the basis of demeanor. See Anderson v. Bessemer City, 470 U.S. 564, 575 (1985); Wainwright v. Witt, 469 U.S. 412, 428 (1985); Patton v. Yount, 467 U.S. 1025, 1038 and n. 14 (1984).

[deponent or affiant] ... would be futile." Arnstein v. Porter, 154 F.2d 464, 470-71 (2d Cir. 1946). If in a wrongful death action, for example, the defendant both asserted that it had a witness who had seen the alleged decedent alive and well long after his purported death, and then actually produced the alleged decedent in court during the hearing on its motion for summary judgment, the plaintiff could not of course avoid the granting of the motion by insisting that cross-examination at trial might convince the trier of fact that the defense witness was lying.

There will, on the other hand, be cases in which the necessary absence of demeanor evidence will preclude the granting of a motion for summary judgment. "Where ... credibility is, or may be crucial, summary judgment becomes improper

and a trial indispensable." Cales v. Chesapeake & Ohio Ry. Co., 46 F.R.D. 36, 40 (W.D. Va. 1969).[29] If the moving party offers affidavits or depositions from witnesses whose truthfulness or reliability are disputed by the opposing party, the court at the summary judgment stage will not be able to rely on the statements of those witnesses. "[T]he mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." Sartor v.

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[29] The 1963 Advisory Committee note to Rule 56 observes:

> Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate.

10 A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2726, p. 115 (1983); see generally id. at 113-21.

Arkansas Natural Gas Corp., 321 U.S. 620, 628 (1944). Where witnesses with personal knowledge of one or more critical facts offer statements in support of the motion, the court must consider the possibility that the demeanor evidence might convince the trier of fact, that the witnesses were unreliable, or even that their statements were the opposite of the truth.[30] A deponent or affiant, if called to testify in open court, might "convince all who

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30 A witness' bearing on the stand may convince a jury

> "not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies."

Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952).

hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression." Untermeyer v. Freund, 37 F. 342, 343 (S.D.N.Y. 1889). The court must bear in mind as well that cross-examination of a witness at a deposition may not be the equivalent of cross-examination at trial, both because the circumstances of a trial, including the presence of a judge or jury, might make a witness more forthcoming,[31] and because

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31 F. James and G. Hazard, Civil Procedure, 275 (2d ed. 1977):

> "There may be a chance that persons who are willing to perjure themselves in an affidavit and even in the informal atmosphere of a deposition may be impelled by the formal trappings of trial and the personal presence of the judge to tell the truth. When summary judgment is granted, this chance is lost.... The strongest case for affording this ... chance probably exists where all the facts are within

the non-moving party may be in a better position to examine the witness at trial in light of additional evidence that was discovered only after the original deposition, or which emerged only during the trial itself.[32]

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the exclusive knowledge of the movant."

Pinson v. Atchison, T. & S.F.R. Co., 54 F. 464, 465 (W.D. Mo. 1893):

"It is sometimes difficult and impossible to get so full, explicit and perspicuous a statement from the witness through a deposition as it is by his examination before court and jury."

[32] 10A C. Wright, G. Miller & M. Kane, Federal Practice and Procedure, § 2727, pp. 120-21 (1983)

"[W]hen the knowledge of the events or occurrences on which the action is based lies exclusively within the control of the party moving for summary judgment ... most commonly in actions in which the main issue involves the movant's state of mind ... [c]ourts have been reluctant to deprive the nonmoving party of the

The history of racial discrimination litigation well illustrates the correctness of the admonition in Hutchinson v. Proxmire. Over the course of the last three decades there have been literally thousands of federal court, state court, legislative and judicial findings of intentional racial discrimination. Yet in a great many of these instances the perpetrator, or one or more of its employees or agents, offered sworn testimony that no such invidious motives were involved. So far as we are aware there is not a single instance in

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opportunity of testing the credibility of the movant or his witnesses in open court.... 'there is a justifiable judicial fear of the injustice which could result from judgment based on affidavits asserting facts that are, because of their nature, incapable of being effectively controverted.'"

(footnotes omitted).

which any one of these witnesses was prosecuted for perjury, although it seems difficult to avoid the conclusion that much of this testimony was not truthful. We do not, of course, suggest that perjury prosecutions ought to become a regular adjunct to civil rights cases, and we do not ask this Court to hold that summary judgment may never be granted to a defendant charged with intentional discrimination. But in applying Rule 56 the courts must bear in mind that undue credulity in accepting sworn protestations of innocence in discrimination cases would, if indulged in in the past, have emasculated the statutory and constitutional prohibitions against purposeful discrimination, and that such credulity in the future would have an equally untoward effect.

B. Petitioner's Legal Arguments

(i) Petitioner repeatedly objects that the statements made by Brieck in his affidavit and deposition -- statements at times in direct conflict with the affidavit and depositions of company officials -- were "self-serving". (Pet. Br. 7, 8, 16 n.10). That is not an accepted basis for objecting to the statements of a witness in connection with either a trial or a motion for summary judgment. This is, after all, not a business school seminar on a hypothetical problem in microeconomics, but a lawsuit between parties who by definition have a direct material stake in its ultimate outcome. Parties do not ordinarily volunteer statements in the course of litigation unless those statements advance their own interests, and employees of a corporate defendant have substantial

reasons to want to provide testimony that will suit the purposes of, and please, their employer; in that sense almost all of the statements in the instant record were self-serving. Petitioner objects in particular to deposition testimony by Brieck that he was more skilled and better qualified than Faust; but having worked with Faust for years, Brieck certainly had substantial personal knowledge of their comparative skills, and was entirely competent to testify abut the matter. The company is, of course, free to argue to the jury that Brieck's testimony should be deemed unreliable because of his interest in the case, or to emphasize that possible source of bias in cross-examination, but petitioner cannot ask a court, in the context of a motion for summary judgment, to resolve such credibility issues in

advance of, and indeed in lieu of, any trial.

(ii) The company argues, in the alternative, that the statements of its own witnesses -- the very management employees alleged to have violated federal law -- must be deemed absolutely and unimpeachably credible. Petitioner frames its contention in the context of an interesting, but somewhat implausible, hypothetical situation. If in an ADEA case a plaintiff were to adduce no evidence of discrimination other than that he had been laid off while a younger employee was retained, and if the defendant were to offer an affidavit or deposition testimony asserting that the decision had been made on a specified non-discriminatory basis, petitioner insists that a court would be required, as a matter of law, to grant summary judgment

for the defendant, unless the plaintiff were to come forward with additional evidence. (Pet. Br. 14-19). On petitioner's view that defense affidavit or deposition would have to be treated as conclusive, regardless of whether it was self-serving, and despite the fact that the trial court would have had no opportunity to observe the demeanor of the affiant or deponent. This hypothetical problem, of course, is not presented by the instant case, for the record here contains a broad array of other evidence, some favorable to petitioner, and some supporting respondent's claim of discrimination.

Petitioner grounds its argument about this hypothetical case on Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), which sets forth the allocation and order of presentation of

proof in the trial of a discrimination claim. Under Burdine a plaintiff may establish a prima facie case of discrimination by adducing evidence that he was available and qualified for the position, and was rejected under circumstances which give rise to an inference of unlawful discrimination, 450 U.S. at 253; in an age discrimination layoff case, the courts below correctly recognized, such a prima facie case can be established by proof that a plaintiff in the protected age group was laid off while an employee under 40 in the same position was retained. (Pet. App. 2a, 3a, 15a). Once a prima facie case has been established, the burden shifts to the defendant to adduce "evidence that the plaintiff was rejected, or someone else preferred, for a legitimate, nondiscriminatory reason." 450 U.S. at

254. If the defendant does so, the burden shifts back to the plaintiff "to persuade the trier of fact that the proffered reason was not the true reason for the employment discrimination". 450 U.S. at 256.

Petitioner's analysis is for several reasons inconsistent with the holding in Burdine. The heart of petitioner's argument is that the effect of defense evidence articulating a legitimate reason for the disputed decisions is to eliminate any genuine issue of fact regarding the discrimination claim, unless the plaintiff proceeds to introduce additional evidence of a very specific nature. (Pet. Br. 17-18). But Burdine held squarely to the contrary, explaining that the result of the introduction of such defense evidence was to "rais[e] a genuine issue of fact as to whether [the defendant] discriminated

against the plaintiff." 450 U.S. at 255. Burdine does not attribute to defense evidence of a legitimate reason the decisive significance urged by petitioner.[33]

Second, Burdine insisted that the purported legitimate reason be contained in admissible evidence, rather than a pleading or argument of counsel, and admonished the trier of fact to carefully scrutinize "[t]he sufficiency of the defendant's evidence" offered to rebut a prima facie case. 450 U.S. at 256. When petitioner discusses a hypothetical situation in which there is no evidence

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[33] Similarly, in U.S. Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711 (1983), this Court held that the effect of the introduction of evidence rebutting a prima facie case was not to compel dismissal of a case, but to require "the factual inquiry [to] procee[d] to a new level of specificity," and to put the trier of fact "in a position to decide the ultimate issue in the case." 460 U.S. at 714.

other than the ages of the two employees and the articulation of a "legitimate reason", it posits a case which quite literally could never occur. There will in fact always be additional evidence; the court necessarily will also know something about the job at issue, and the defendant witness will assert, not an unnamed "legitimate reason", but some specific identified reason. A court presented with a motion for summary judgment or a trier of fact will always have at least some basis for evaluating the proffered explanation, and in certain cases might on that basis entertain serious or even fatal doubts about its authenticity. If in this case, for example, Sekeras had claimed in his sworn deposition that he had chosen to retain Faust rather than Brieck because of a then recently published horoscope, that preposterous but non-discriminatory

explanation would on petitioner's view have required the entry of summary judgment for the company, although no sensible judge would have granted such a motion.[34]

Finally, petitioner insists that a plaintiff should not be permitted to defeat a motion for summary judgment merely by relying on his prima facie case and the possibility that the trier of fact, after observing the demeanor of the witness who had executed the affidavit or gave deposition relied on by the defendant, might conclude that the witness was lying. Burdine squarely holds that, if a discrimination case goes to trial, the trier of fact may indeed reject an

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[34] "[T]he witness' ... story itself may be so internally inconsistent or so implausible on its face that a reasonable factfinder would not credit it." Anderson v. Bessemer City, 470 U.S. 564, 575 (1985).

explanation as pretextual solely on the basis of the prima facie case and the lack of credibility of the witness offering the employer's justification:

> [P]laintiff's initial evidence ... and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant will suffice to discredit the defendant's explanation.

450 U.S. at 255 n.10. Burdine stressed that a plaintiff may prevail, inter alia "by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256.[35] At trial the evidence on which such a showing might be made could

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35 Similarly, the Court held in U.S. Postal Service Bd. of Govs. v. Aikens that it was for the trier of fact to decide regarding the evidence "whatever weight and credence it deserves." 460 U.S. at 714 n. 3 (1983).

well be the demeanor of the witness, if he "fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers". Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 270 (1986) (Rehnquist, J., dissenting). An employer may insist that its star witness is the paragon of truthfulness sought by Diogenes, but the trier of fact might conclude that the witness more closely resembles automobile publicist Joe Isuzu. If, as Burdine holds, a proffered explanation could be rejected largely or solely on the basis of credibility, it necessarily follows that a plaintiff would ordinarily be entitled to a trial at which he could attack the credibility of that witness and provide the trier of fact with an opportunity to observe the demeanor of that witness. The

decisive weight which petitioner seeks to accord to such defense testimony -- regardless of its credibility -- is squarely contrary to the intent of the framers of Rule 301 of the Federal Rules of Evidence.[36]

This is not to say, as petitioner suggests, that summary judgment will never be available in discrimination cases. In such cases, as in all other judicial proceedings, there is invariably a body of clearly undisputed facts, and in some

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36 The Advisory Committee note to Rule 301 states in part:

> "The so-called 'bursting bubble' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions 'too slight and evanescent' an effect.

(Emphasis added). Federal Civil Judicial Procedure and Rules, 274 (1987 ed.).

instances those facts might be sufficient to warrant the granting of a motion under Rule 56. In the instant case, for example, if Harbison-Walker had had prior to 1982 a written, uniformly and repeatedly enforced rule giving preferential treatment in layoffs to whichever worker had held the largest number of different positions at the company -- a rule whose existence could in all probability have been established by reference to objective facts raising no issues of credibility -- summary judgment might well have been appropriate. But where, as here, an employer chooses, or is compelled by the nature of the evidence, to hang its hopes on the statements of one or more witnesses that they made the disputed employment decision for some legitimate, non-discriminatory reason, Rule 56 does not authorize a court

presented with a motion for summary judgment simply to ignore the possibility that those witnesses are lying, or to attempt to assess the credibility of the witnesses without having had any opportunity to observe their demeanor.

(iii) Petitioner asserts, finally, that the claims in this case amount to little more than an attack on the company's "business judgment," contrary to the intent of Congress that "management prerogatives ... be left undisturbed" to the extent no unlawful discrimination is involved. (Pet. Br. 7, 10, 19 n. 13) We do not suggest that Congress intended the fair employment laws to turn federal judges into captains of industry. The statutes which prohibit intentional discrimination do not make it a federal offense for a company to make business judgments which are mistaken, silly, or

financially suicidal; an employer foolish enough to do so may, if it acts in good faith, deliberately prefer incompetence to competence, corruption to honesty, or mendacity to truthfulness. But neither the intent of Congress to leave untouched neutral albeit mistaken business decisions, nor impassioned invocation by a defendant of the importance of management prerogatives, can prevent a federal court from considering whether in a particular case a disputed action was in reality taken for invidious reasons. Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 259.

Petitioner appears to contend that a finding of purposeful employment discrimination, if based in part on proof that the plaintiff was better qualified than the individual actually hired, promoted or retained, would have the

effect of making innocent and unavoidable errors of business judgment a violation of federal law. On this view a plaintiff in an ADEA or Title VII suit cannot offer evidence that he or she was better qualified than the employee who actually won or kept the desired job. This is, of course, precisely the opposite of the position taken by the defendant employer in Patterson v. McClean Credit Union, No. 87-107 which maintains that a plaintiff in an employment discrimination case must offer such evidence of his or her superior qualifications.[37] We maintain that the correct rule is an intermediate one,[38]

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[37] Brief for Respondent, No. 87-107, pp. 41-46.

[38] The Court noted in Texas Dept. of Community Affairs v. Burdine that evidence that a rejected applicant was in fact better qualified than the individual hired, retained or promoted "may be probative of whether the employer's reasons are pretexts for discrimination." 450 U.S. at 259.

that evidence of comparative qualifications may be offered by either party in an employment discrimination action, that the presence or absence of such evidence is not as a matter of law either necessary or sufficient to establish the existence of unlawful discrimination, and that the weight to be accorded evidence of this sort must be evaluated by the trier of fact in the context of all the other circumstances of the case.

C. The Role of Discretion in Disposing of Motions for Summary Judgment

Rule 56 accords to the district court a degree of discretion to deny a motion for summary judgment if the judge believes that the "just, speedy, and inexpensive determination" of a case would be facilitated by permitting the case to go

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to trial.[39] Under Rule 50(a), which permits a judge to grant a directed verdict, it is a common practice for judges to defer action on a motion for a directed verdict and wait until the jury has returned its verdict. The considerations which militate in favor of postponing action on a motion for a directed verdict will at times be applicable to a motion for summary judgment.

Whenever a district judge grants a motion for a directed verdict without awaiting the jury's verdict, he or she runs the risk that the order, if overturned on appeal, will have had the

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[39] 10 C. Wright, G. Miller & M. Kane, Federal Practice and Procedure, § 2728, pp. 187-88 and n. 11 (1983) (citing cases); cf. Kennedy v. Silas Mason Co., 334 U.S. 249, 257-58 (1948) (although summary judgment might technically be possible, in some cases "good judicial administration" requires that case be tried on the merits).

effect of postponing the trial, and possibly precipitating a second appeal, thus significantly delaying the final disposition of the case, and substantially increasing the burdens on the judiciary and parties alike. If, as a district judge believes, there is indeed too little evidence to support a verdict for the non-moving party, it is extremely likely that a jury would return a verdict in favor of the moving party, thus greatly simplifying the issues on appeal, and quite possibly discouraging any appeal at all by the non-moving party. If, on the other hand, the propriety of a directed verdict is a close question, the odds that the jury might err in its verdict may be higher, but so is the danger that an order directing a verdict will be overturned. For these reasons the decision whether to defer action on a motion for a directed verdict

often depends greatly on the length of the trial proceedings that lie ahead. Where only a few days of trial are involved, the very small amount of time and energy that could be saved by directing a verdict is likely to be outweighed by the substantial delays and unnecessary cost that will be involved if the decision to direct a verdict is overturned; a brief trial brings the proceedings to an end, and will entail far less time and energy than would be involved in the preparation of trial and appellate court briefs, and the drafting of judicial opinions at both levels. Conversely, where a long and expensive trial is still in the offing at the close of the plaintiffs' case, the court ought to be substantially more

willing to run the risks inherent in ordering a directed verdict.[40]

The substantive issue raised by a motion for summary judgment is similar to that posed by a motion for a directed verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. at 250, 251 (1986).[41] Professor

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40 The desirability of deferring action on a motion for a directed verdict until the jury has first returned its own verdict is discussed in 9 C. Wright and G. Miller, Federal Practice and Procedure, § 2534, p. 586 (1971) (citing cases); 5A Moore's Federal Practice ¶ 50.05[3] (1988).

41 The differences in the procedural posture of these motions may cut both ways in the district court's decision as to whether to await the verdict of the jury. Because a motion for summary judgment comes prior to the presentation of the plaintiff's case, the length of the possibly unnecessary case will be longer than would be true on a motion for a directed verdict; conversely, at the summary judgment phase the court will often have a less complete understanding of the case than would be true after the close of the plaintiff's case, particularly regarding demeanor evidence, and thus runs a greater risk of error if it grants the motion.

The substantive standards for

Moore has observed:

> The delay and waste that result from improper handling by the district court of the motion for summary judgment bears a certain resemblance to the delay and ... waste from the improper handling of the motion for directed verdict.... It is a waste of judicial resources if tremendous time and energy must be spent by a party resisting a motion for summary judgment either to convince the district court that the motion should be denied, or where the district court has granted the motion, in obtaining a reversal.

6 Moore's Federal Practice ¶ 56.02 [10], p. 56-46 (1987). A district court presented with a motion for summary judgment ought in deciding how to act on that request exercise the same discretion,

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granting a motion for summary judgment and a motion for a directed verdict may differ to some degree. See 10 C. Wright, G. Miller and M. Kane, Federal Practice and Procedure, § 2713, pp. 617-20 (1983); cf. Dombrowski v. Eastland, 387 U.S. 82, 84 (1967) (evidence sufficient to withstand motion for summary judgment, although not necessarily sufficient to support jury verdict for non-moving party).

for essentially the same reasons, that would be appropriate if a directed verdict were requested in the proceeding.

> Summary judgment, with ever-lurking issues of fact, is always a treacherous shortcut.... Such relief is always discretionary, and in [some] cases ... sound judicial administration dictates that the court withhold judgment until the whole factual structure stands upon solid foundation of a plenary trial where proof can be fully developed, questions answered, issues clearly focused and facts definitively found.

Petition of Bloomfield S.S. Co., 298 F. Supp. 1239, 1242 (S.D.N.Y. 1969)

> [E]ven though the summary judgment standard appears to have been met, the court should have freedom to allow the case to continue when it has doubt as to the wisdom of terminating the action prior to a full trial.... This is especially true if disposing of the summary judgment motion would require as much time as a full trial on the merits; in the event Rule 56 no longer serves the purpose of saving the court's and litigant's time.

10A C. Wright, G. Miller & M. Kane, Federal Practice and Procedure, § 2728, pp. 188-92 (1983) (footnotes omitted).[42] Judge Frank a generation ago admonished, "The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered." Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2d Cir. 1945).

We do not contend that action on a motion for summary judgment should automatically be deferred until after trial, even if the trial is likely to be a

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42 Elliott v. Elliott, 49 F.R.D. 283, 284 (S.D.N.Y. 1970) (summary judgment "is intended to economize the court's time, and its purpose is totally frustrated if determination of the motion would require as much time as a full trial on the merits"); First Nat. Bank v. Cities Service Co., 391 U.S. 253, 304 (1968) (Black, J., dissenting) ("summary judgment ... took 11 years.... It certainly would not have taken one-tenth of that much time to give the case a full-dress trial. An excuse for summary judgments has always been that they save time").

short one; we suggest only that the decision whether to do so ought be made in a deliberate and informed manner. In a case where a Seventh Amendment jury has been requested, deferring action until the jury has spoken may avoid the constitutional issues that would be raised if summary judgment were granted; a jury verdict in favor of the moving party, if challenged on appeal, would ordinarily raise only non-constitutional issues.

This case, we urge, illustrates the need for such a carefully considered exercise of discretion. The instant controversy involves a modest number of witnesses and documents; it could have been tried in a few days after the completion of discovery in 1985. Had the jury accepted the interpretation of the evidence advanced by petitioner in this Court, its verdict in favor of the company

would in all likelihood have ended the litigation. Had the jury returned a verdict for plaintiff, and the defendant filed the necessary motions for directed verdict and judgment n.o.v., the appeal which followed would have raised virtually the same issues and have been heard at virtually the same point in time, as the instant appeal regarding the motion for summary judgment. By choosing instead to grant the motion for summary judgment, the district court risked what may prove to be three years of unnecessary appellate litigation in order to avoid a trial of as many days. If this Court had before it both the verdict of a jury and the judgment of the trial court as to the sufficiency of the evidence, the Court would be in a position to bring this litigation to a close. Because, however, the district court opted to rule on the

motion without awaiting a jury verdict, this Court, like the court of appeals, must now remand the case for the trial that could have occurred in 1985, and perhaps for a second round of appeals as well.

CONCLUSION

For the above reasons the judgment and opinion of the third circuit should be affirmed.

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FOR ARGUMENT

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No. 87-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC.,
Petitioner,

v.

EUGENE F. BRIECK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its opening brief, Petitioner, Harbison-Walker Refractories ("Harbison-Walker" or the "Company") demonstrated that the decision below erroneously permits an age discrimination plaintiff to present his case to a jury, even though he has offered no direct or indirect evidence that the challenged employment decision was motivated by his age. Though Respondent and its amici urge this Court to sanction that error—and thus, in effect, to emasculate the role of summary judgment in age discrimination cases—they provide no convincing reasons for this Court to do so.

I.

Respondent and its amici cannot, and do not (R. Br. 78, U.S. Br. 9-10, PELA Br. 17), dispute that "[t]he ultimate burden of persuading the trier or fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Watson v. Fort Worth Bank & Trust*, —— U.S. ——, 56 U.S.L.W. 4922, 4924 (June 29, 1988). Nor can they dispute (U.S. Br. 17-18) that summary judgment must be entered against a plaintiff who, faced with an employer's properly-supported motion, "fail[s] to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). But they assiduously avoid the result that these principles compel: that an age discrimination plaintiff cannot survive summary judgment unless a fair-minded jury could conclude, from the record as a whole, that the plaintiff was the victim of intentional discrimination "because of [his] age" (Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1) (1982); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)), and that a fair-minded jury could not have so concluded here.

The evidence in this age discrimination case "is so one-sided that [Petitioner] must prevail as a matter of law." *Anderson*, 477 U.S. at 252. As explained in its opening brief (P. Br. 6, 16-18), Harbison-Walker supported its summary judgment motion with admissible evidence that it based its decision to lay off Respondent earlier than 39-year-old Hugh Faust, and later to recall Faust rather than Respondent, on entirely legitimate and age-neutral reasons. It demonstrated that the economic downturn in its business prompted Respondent's layoff (J.A. 12-15); that the Company had, and followed, an informal layoff policy which required consideration of both "[l]ength of company service *and* skill requirements necessary to carry out the reduced business activities . . ." (J.A. 47; emphasis added); that the Company had, and followed, a policy which required special corporate review of any layoff affecting an employee with more than 15 years of service (J.A. 128-32); that, in addition to installation experience, Faust had skills in marketing and administrative matters—functions that Respondent had neither the experience nor the training to perform—which the Company could draw upon in the reduced work environment (J.A. 14-15, 105); that the Company in fact used Faust's more diverse skills after Respondent's layoff in July 1982, both before Faust's November 1982 furlough (J.A. 156) and after his August 1983 recall (J.A. 160); and that, while both Faust and Respondent had substantial company service, Faust generally had higher performance ratings than Respondent (J.A. 15, 31). Harbison-Walker, moreover, presented substantial indirect, objective evidence—e.g., the Company initially retained and recalled an *older* installation specialist, 59-year-old Al Malarich, instead of Respondent (J.A. 33, 123-25); only three of the twelve employees laid off from the Company's Iron and Steel Marketing Support Group ("Steel Group") in 1982 were over age 40 (J.A. 33); after the layoffs, over half of the employees remaining in the Steel Group were over age 40 (J.A. 32); and the average age of the Steel Group's employees actually increased as a result of the layoffs (J.A. 31-32)—which amply demonstrate that its decision was not motivated by Respondent's age.

Respondent nonetheless characterizes this case as a "classic case of . . . sharply conflicting evidence" in which "[g]enuine disputes about material facts . . . abound" (R. Br. 9, 54). This case presents nothing of the sort. Respondent has conceded the underlying material facts—to wit, that the economic downturn in Harbison-Walker's business prompted his layoff (J.A. 94, R. Br. 2-3); that

the Company's layoff policy turned, in part, on its assessment of skill requirements needed in the reduced business setting (J.A. 96, R. Br. 19); that Faust had more diverse experience than Respondent (J.A. 52-53, R. Br. 42); and that the Company occasionally drew upon Faust's more diverse skills in the reduced work environment (J.A. 44, R. Br. 49-52). Respondent's persistent quibbling about immaterial facts (R. Br. 18-43) (e.g., his subjective evaluation of his and Faust's respective qualifications as pure installation specialists) only underscores the absence of either direct or indirect evidence from which a reasonable jury could have inferred that the Company's business judgment was motivated by age.

To be sure, intentional discrimination often presents an "elusive factual question." *Burdine*, 450 U.S. at 255 n.8. But the general elusiveness of the inquiry does not mean, as Respondent and its amici insist (R. Br. 61-72, AARP Br. 7-8, PELA Br. 23-27), that cases which turn on motive are uniformly inappropriate for summary judgment. This Court rejected that argument in *Anderson* (477 U.S. at 256):

> Respondents argue . . . [that] the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue. . . . We do not understand *Poller* [*v. Columbia Broadcasting System*, 368 U.S. 464 (1962)], however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial. . . .

Because Respondent failed to present any "concrete evidence" from which a reasonable jury could have inferred that Harbison-Walker discriminated against him because

of his age, the mere fact that Harbison-Walker's motive is at issue does not defeat summary judgment.[1]

II.

Diverting attention from the crucial inquiry in age discrimination cases—whether the plaintiff has produced sufficient evidence from which a reasonable fact finder could conclude that he is a victim of intentional discrimination because of his age—Respondent and its amici attribute to Petitioner arguments that are not, and have never been, its position.

A.

Petitioner has not, as the United States suggests (U.S. Br. 13), mounted "an oblique attack" on this Court's decision in *Burdine*. Petitioner has always recognized (P. Br. 14) that a plaintiff can prove employer pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973). *See also United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). Harbison-Walker has merely claimed that (P. Br. 14-18), regardless of whether the plaintiff seeks to prove his case directly or indirectly, he must "prove by a preponderance of the evidence that the legitimate rea-

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[1] Respondent places great weight on *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), to support its argument that this Court has cautioned against summary judgment in motive cases (R. Br. 61-72). But the Court in *Anderson* expressly stated that *Hutchinson*'s statement that proof of malice "'does not readily lend itself to summary disposition' was simply an acknowledgement of our general reluctance 'to grant special procedural protections to defendants in libel and defamation actions. . . .'" *Anderson*, 477 U.S. at 256 n.7 (quoting *Hutchinson*, 443 U.S. at 120 n.9, and *Calder v. Jones*, 465 U.S. 783, 790-91 (1984)).

sons offered by the defendant were not its true reasons, but were a pretext for discrimination" (*Burdine*, 450 U.S. at 253; *see also Watson v. Fort Worth Bank & Trust*, 56 U.S.L.W. at 4924), and that Respondent did not do so here.

The court below did not "faithfully follow[]" (U.S. Br. 10) these standards. It held that the Company's use of Faust's more diverse skills for less than 25 percent of the time after his recall cast doubt on the credibility of its explanation for Respondent's layoff, and thus "permit[ted] a reasonable inference that the . . . proffered explanation . . . is unworthy of credence" (Pet. App. 2a). But Respondent's challenge to the credibility of the Company's reason does not prove that the "proffered explanation lack[s] a factual basis" and is a pretext for discrimination. *Burdine*, 450 U.S. at 258. To the contrary, because Respondent concedes that Faust had more diverse experience than Respondent and that Harbison-Walker relied upon that experience some of the time, a jury could not reasonably infer from his challenge that the Company's stated reason was "not its *true* reason[ ]" (*id.* at 253; emphasis added), much less that it was a "cover-up" for intentional age discrimination (*McDonnell Douglas*, 411 U.S. at 805). *Burdine*'s "unworthy of credence" language cannot be fairly read to encompass an objectively truthful, but perhaps subjectively disagreeable, explanation for a business decision. *See, e.g., Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559-560 (7th Cir.), *cert. denied*, 108 S. Ct. 488 (1987); *Grigsby v. Reynolds Metal Co.*, 821 F.2d 590, 596-97 (11th Cir. 1987); *Dea v. Look*, 810 F.2d 12, 14-16 (1st Cir. 1987).

The United States misses the mark in contending that Petitioner's analysis "misstate[s] . . . the use to which th[e] evidence [of Faust's post-recall duties] was put" and that Respondent's argument is not that Harbison-Walker's decision was "unwise" (U.S. Br. 16). Respondent's arguments below (J.A. 37-45, 51-53), and his arguments here (R. Br. 32-55), reveal the true nature of his challenge: that Harbison-Walker misjudged Respondent's qualifications and its need for Faust's more diverse skills. The court below, moreover, found that a jury could find unlawful "pretext" if Faust's " 'more varied" skills were *neither employed nor required*" by Harbison-Walker. Pet. App. 5a (emphasis added). But it is undisputed that Faust's skills were "employed"; and permitting a jury to decide whether those skills were "required" simply invites subjective disagreement with Harbison-Walker's business judgment. Even the United States concedes (U.S. Br. 16), and the case law clearly holds (*see, e.g., Branson v. Price River Coal Co.*, 46 Fair Empl. Prac. Cas. (BNA) 1003, 1006-07 (10th Cir. 1988); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987)), that such subjective disagreement cannot support a finding of pretext.

This is not to say, and Petitioner has never asserted, that evidence of an employer's actions after making a challenged employment decision can "never . . . be used to establish pretext" (U.S. Br. 16). In some circumstances, such evidence might be indirectly probative of the employer's intent (*see id.* at 17). But, here, Respondent's concession that Harbison-Walker used Faust's more diverse skills some of the time renders that evidence "not significantly probative" (*Anderson*, 477 U.S. at 249-50), especially when viewed in light of the record as a whole. *See* U.S. Br. 11 ("[I]t is arguable that respondent's evidence—which did not refute the contention that petitioner used Faust's office skills at least some of the time—was not sufficiently probative to raise real doubts about petitioner's veracity"). Thus, Harbison-Walker's failure to use Faust's skills more often—though perhaps probative, in retrospect, of the accuracy of the Company's prediction of its future needs—is simply too attenuated a base for permitting a jury to find a "pretext for [age] discrimination." *Burdine*, 450 U.S. at 253.

B.

Respondent and its amici further challenge a principle that should be incontrovertible (R. Br. 75-86, U.S. Br. 14-15, AARP 11-12): that, to survive summary judgment in an age discrimination case, an ADEA plaintiff must "forge [a] link between the challenged decision and age" (P. Br. 18) with evidence that is sufficient to permit a fair-minded jury to conclude that the employer engaged in unlawful discrimination. This challenge is unfounded.

The necessary link to age discrimination is not, as Respondent's amici contend, "forged by the establishment of a prima facie case" (U.S. Br. 14; *see also* AARP Br. 11). A discrimination plaintiff's initial burden of proving a prima facie case is "not onerous" (*Burdine*, 450 U.S. at 253).[2] Of course, once established, a plaintiff's prima facie case gives rise to a "presumption that the employer unlawfully discriminated against the employee" (*id.* at 254). But it is also true that the employer's articulation of " 'some legitimate, nondiscriminatory reason for the employ[ment action]' " (*id.* at 253, quoting *McDonnell Douglas*, 411 U.S. at 802) "destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence." *Burdine*, 450 U.S. at 254-55 and n.10. Thus, although the fact finder may consider the plaintiff's initial evidence in deciding the ultimate issue of discrimination—and Petitioner has never argued, as the United States claims, that the fact finder cannot do so (*compare* U.S. Br. 15 *with* P. Br. 13-14

[2] Indeed, as Petitioner noted in its opening brief (P. Br. 13 n.6), some circuits, including the Third Circuit, have concluded that a plaintiff can establish a prima facie case merely by demonstrating that he is in the protected age group and was laid off while younger employees were retained in similar jobs for which he was qualified. *See Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983); *Thornbrough v. Columbus & Greenville Railroad*, 760 F.2d 633, 641-45 (5th Cir. 1985).

n.7)—that evidence, once rebutted, carries no presumptive force at all and is insufficient, by itself, to withstand summary judgment. *See Burdine*, 450 U.S. at 254-55 and n.10; *see also Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978) ("[a] *McDonnell Douglas* prima facie showing is not the equivalent of a factual finding of discrimination . . .").[3]

This is not a case in which the employer articulated an objectively false reason for an employment decision.[4] To the contrary, Harbison-Walker effectively rebutted Respondent's prima facie case with a legitimate explanation for its decision to retain and recall a younger employee; and Respondent has not disputed the material facts underlying that decision. To survive summary judgment in this case, therefore, Respondent could not "merely rest on the laurels of [his] prima facie case. . . ." *Grigsby v. Reynolds Metal Co.*, 821 F.2d at 596. He had to come forward with something more probative than his subjective disagreement with the wisdom of his employer's decision to "forge the critical link" (Pet. App. 23a) between that decision and his age.

[3] *See generally* Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 Stan. L. Rev. 1129, 1145-47 (1980). The insistence of Respondent and its amicus that this Court has rejected Professor Thayer's "bursting bubble" theory of presumptions—and their effort to treat the plaintiff's prima facie evidence as carrying, in effect, a mandatory inference of discrimination (R. Br. 81-84, PELA Br. 11-16)—are flatly contrary to this Court's decision in *Burdine*. *Burdine* makes abundantly clear that Professor Thayer's theory is precisely the theory that governs presumptions in employment discrimination cases. *See* 450 U.S. at 255 n.10 (citing J. Thayer, *Preliminary Treatise on Evidence* 346 (1898); *id.* at 254 n.7 (in employment discrimination cases, a prima facie case "denote[s] the establishment of a legally mandatory, rebuttable presumption," rather than "the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue").

[4] As Petitioner suggested in its opening brief (P. Br. 15 n.8), had Respondent done so, summary judgment might well have been inappropriate.

Nothing in Petitioner's Brief suggests, as Respondent's amici seemingly believe (U.S. Br. 14), that Respondent had to forge that "link" with direct evidence of an intent to discriminate. Petitioner made clear in its opening brief that, consistent with *Burdine* and *Aikens*, indirect evidence may suffice if it is sufficiently probative of the ultimate issue of age discrimination (P. Br. 14-16). As Petitioner explained (*id.* at 15-16; citations omitted), it is possible for a jury to infer discrimination from indirect evidence that, e.g., an employer made a particular employment decision in contravention of established and consistently-applied procedures, that management personnel made comments reflecting a negative attitude toward older workers, that company documents indicate a preference for younger employees, or that relevant statistics demonstrate a pattern of adverse treatment of older workers. *See generally McDonnell Douglas*, 411 U.S. at 804-05. But Respondent produced no such evidence here. The complete absence of any evidence linking Harbison-Walker's decision to Respondent's age amply demonstrates that this purportedly "close case" (R. Br. 13; U.S. Br. 17 n.11), in fact, is not a case of discrimination at all.

III.

This is hardly an "unexceptional case" (U.S. Br. 7). The court below has sent what is, indeed, an exceptional signal to courts in the Third Circuit: that, even in a case where the plaintiff has mustered no direct or circumstantial evidence from which a reasonable jury could possibly conclude that he is the victim of unlawful discrimination, summary judgment is unavailable. Tolling the death knell for summary judgment in age discrimination cases, as the decision below does, plainly thwarts the important policies underlying summary judgment procedure. It disregards "the rights of persons opposing [a plaintiff's] claims . . . to demonstrate in the manner provided by [Rule 56], prior to trial, that the claims . . . have no

factual basis" and permits those claims to "go[] to trial with the attendant unwarranted consumption of public and private resources." *Celotex Corp. v. Catrett*, 477 U.S. at 327. That more employment-related civil rights cases go to trial than any other category of federal question and diversity cases only underscores that, absent a different signal from this Court, this unwarranted decision will produce a more significant drain on those resources. *See Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts* (1986), Table C-4 (at 206).

The important issue that this allegedly "unexceptional" case presents, moreover, has sparked substantial interest. The amici briefs filed by groups representing both the plaintiffs' bar and the employers' bar make amply clear that, after the decision below, they are uncertain as to the role of summary judgment in employment discrimination litigation. This confusion is not surprising. The decision below stands in stark contrast to the decisions of other courts that have upheld summary judgment against a plaintiff who merely "casts doubt" on the employer's articulated reason for a challenged decision but demonstrates no nexus between that decision and age discrimination. *See, e.g., Dea v. Look*, 810 F.2d 12, 15 (1st Cir. 1987); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464-65 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987). Only this Court can resolve this "recurring area of confusion," *Sorba v. Pennsylvania Drilling Co.*, 821 F.2d 200, 202 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 730 (1988), and send a clear signal to the lower federal courts: that where, as here, no reasonable jury could conclude that the plaintiff is the victim of age discrimination, summary judgment must be granted.

CONCLUSION

For the foregoing reasons, and for the reasons advanced in Petitioner's opening brief, the decision below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1987

HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC., PETITIONER

v.

EUGENE F. BRIECK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a plaintiff who is contesting the termination of his employment in an action under the Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. III) 621 *et seq.*, may withstand the employer's motion for summary judgment by using the employer's post-termination actions to establish that the employer's proferred reason for the termination was a pretext for unlawful discrimination.

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BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case concerns the nature and extent of the plaintiff's evidence required to withstand a defendant's motion for summary judgment under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. (& Supp. III) 621 *et seq.* The Equal Employment Opportunity Commission (EEOC) has responsibility for the administration, interpretation, and enforcement of the ADEA. In addition, the Attorney General and the EEOC have substantial responsibility for the enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, upon which the ADEA is modeled. The federal government also is an employer subject both to the ADEA (29 U.S.C. 633a) and to Title VII (42 U.S.C. 2000e-16). Resolution of the issue here accordingly will affect the government's enforcement

efforts under the ADEA and Title VII, as well as the government's role in litigation under those statutes as a defendant.

STATEMENT

Petitioner is a producer of ceramic brick products. Until 1982, it employed respondent as a brick installation specialist. In July of that year petitioner laid off respondent, then aged 55, and another installation specialist, then aged 59. Approximately one month later, petitioner fired a third installation specialist, then aged 59. In November 1982 petitioner laid off its final installation specialist, Hugh Faust, then aged 39. Faust was recalled in July 1983. Respondent, pointing to his own discharge and to the subsequent recall of the younger Faust, then brought suit under the ADEA, alleging that petitioner had discriminated against him on the basis of age. Pet. App. 12a, 13a.

The district court granted petitioner summary judgment (Pet. App. 12a-21a).[1] The court found that respondent had made out a prima facie case of discrimination by demonstrating that "[h]e was 55 years old when he was laid off" and that "[h]e certainly was qualified to work as an installation specialist, the job now held by Faust, a younger employee" (*id.* at 15a). The court was persuaded, however, by petitioner's "explanation of its bona fide business reasons behind its action" (*ibid.*). As the court explained, "the chief reason for retaining Faust, according to [petitioner], was his experience as a sales correspondent. He thus was practiced in working with records and written reports, in customer relations, and in preparing bids and quotations." In contrast, respondent lacked experience in these areas. *Id.* at 15a, 16a.

[1] The court also rejected respondent's claims of breach of contract and tortious infliction of emotional distress (Pet. App. 17a-20a). Those rulings were affirmed by the court of appeals (*id.* at 6a-7a) and are not at issue here.

The court rejected respondent's "attempt to expose these alleged justifications as [a] pretext by coloring Faust's prior experience as unimportant" (Pet. App. 16a). The court noted that respondent did "not refute Faust's prior experience with office matters such as price quotations, customer contact, and setting priorities for orders from the manufacturing plant" (*ibid.*). And the court was unpersuaded by respondent's argument that Faust's experience as a sales correspondent was irrelevant because "Faust spends about three-fourths of his time on installation work" (*id.* at 16a-17a). In the court's view, "[a]ny question about the appropriateness of how Faust now spends his time edges into the area of judicial scrutiny of business decisions, which is not part of our function. We nonetheless consider it plausible that the importance of an employee's related experience, whether or not frequently applied, increases under the scaled-down business operations which in fact existed." *Id.* at 17a. The court therefore concluded that it could not "find that age was a determinative factor in the decision to lay off [respondent]" (*ibid.*). For that reason, the district court granted petitioner summary judgment.[2]

The court of appeals reversed, holding that the award of summary judgment to petitioner was improper (Pet. App. 1a-11a). The court found it undisputed that respondent had made out a prima facie case of discrimination (*id.* at 2a-3a). Conversely, the court noted that respondent "introduced

[2] The district court reaffirmed its decision on respondent's motion for reconsideration (Pet. App. 22a-25a), reiterating its view that, while respondent had made out a prima facie case, he had failed to demonstrate that petitioner's explanation of its action was a pretext for discrimination. The court opined that, "[i]n attempting to carry this burden, [respondent] failed to forge the critical link between [petitioner's] actions and [respondent's] age with *relevant* proof" (*id.* at 23a (emphasis in original)).

no evidence to counter the assertion that Faust's prior experience with office matters such as price quotations, customer contact, and setting priorities for orders from the manufacturing plan[t], distinguishes his qualifications from those of [respondent]" (*id.* at 4a). But the court found a disputed issue of fact concerning the question whether Faust's acknowledged office experience was the actual reason for his retention.

The court noted respondent's evidence that Faust spent some 75% of his time on installation work, and that "[t]he remaining time was spent preparing reports of installations, an activity performed by all installation specialists including [respondent], doing some filing and working on margins" (Pet. App. 5a). This evidence, the court found, "is inconsistent with [petitioner's] expressed need for diverse skills gained from Faust's marketing and sales experience. This evidence raises a question of fact as to whether the employer really believed that Faust's 'varied' experience made him more qualified than [respondent] to perform the job functions remaining in the reduced business environment." *Ibid.* The court added (*id.* at 5a-6a):

> if the jury finds that the asserted 'more varied' skills were neither employed nor required in the position for which Faust was preferred, the jury might find the employer's asserted reason for preferring Faust to be pretextual * * *. The district court erred in resolving this factual dispute. The question is not whether the employer's asserted reason is plausible, but whether there is also evidence of record which, if credited, could render the reason implausible.

The court of appeals also rejected the district court's suggestion that respondent's argument amounted to an attack on petitioner's business judgment. The court of appeals explained that "[t]he question on summary judgment is

whether evidence of the duties actually performed by Faust upon his recall could cast doubt on the [petitioner's] assertion that Faust was retained because of his more diverse skills. We find the answer to be in the affirmative." Pet. App. 6a. The court of appeals therefore reversed the grant of summary judgment and remanded the case for trial.[3]

SUMMARY OF ARGUMENT

The three-step framework for resolving ADEA actions, first set out in the Title VII setting in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), is familiar. The plaintiff begins by establishing a prima facie case; the burden then shifts to the defendant to proffer a legitimate, nondiscriminatory reason for its action. At the third stage of the *McDonnell Douglas* framework – the one at issue in this case – the plaintiff then is given an opportunity to show that the proffered reason is a pretext for discrimination. As the Court has expressly explained, a plaintiff may make this showing in one of two ways: "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981). The court of appeals here faithfully followed this approach. Reviewing the record, the court pointed to evidence that Faust spent only a small percentage of his time doing things that respondent was not trained to do. This evidence, the

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[3] Judge Weis dissented (Pet. App. 8a-11a). Noting Faust's superior skills as a sales representative, Judge Weis reasoned that "[o]ne must question * * * whether [respondent] has demonstrated the implausibility of the [petitioner's] asserted reasons for preferring Faust when [respondent] admits his skills do not match his rival's diverse abilities" (*id.* at 10a). Judge Weis therefore concluded that "a jury could not properly decide in the [respondent's] favor" (*id.* at 11a).

court explained, tended to show pretext because it "is inconsistent with [petitioner's] expressed need for diverse skills." The court therefore concluded that the evidence of Faust's actual duties could lead a jury to "find [petitioner's] asserted reason for preferring Faust to be pretextual." Pet. App. 5a.

Petitioner challenges the court of appeals' analysis by asserting that a plaintiff who has established a prima facie case in an ADEA action may rebut an employer's proffered, nondiscriminatory explanation of its actions only by offering evidence that *itself* directly tends to establish discrimination; petitioner contends that it is not enough for the plaintiff to show that the employer's stated explanation is unbelievable. This argument, however, is flatly inconsistent with *Burdine*'s conclusion that pretext may be established by showing that the "employer's proffered explanation is unworthy of credence." More fundamentally, petitioner's analysis cannot be squared with the logic of the *McDonnell Douglas* framework. Evidence establishing a prima facie case, if unrebutted by the defendant, entitles the plaintiff to summary judgment; if the plaintiff can show that the defendant's proffered explanation is unbelievable, he should be left, at the very least, in the same position that he would have been in had his prima facie case not been rebutted in the first place. Indeed, a showing of pretext should, if anything, strengthen the plaintiff's case, since a defendant who offers an unbelievable response to an accusation of discrimination is likely to have something to hide.

Petitioner also argues that evidence of the duties actually assigned to Faust after his recall should not have been considered by the court of appeals because that evidence goes only to the soundness of petitioner's business judgment. This argument is grounded on a misstatement of the use to which the disputed evidence was put. Respondent is not arguing that petitioner was *unwise* in thinking that it

would need an employee with training as a sales correspondent; respondent instead wants to use Faust's post-recall duties as evidence that petitioner *never* had any intention of using Faust as a sales correspondent. Since an employer's actual conduct surely sheds at least some light on its past intentions, there is no reason to deny a factfinder use of the sort of evidence offered by respondent here.

Petitioner's final argument—that the court of appeals departed from the summary judgment standards set out in Fed. R. Civ. P. 56—amounts to a quibble with the court of appeals' assessment of the facts of record. The court expressly found that respondent's evidence "raises a question of fact as to whether [petitioner] really believed that Faust's 'varied' experience made him more qualified than [respondent]" (Pet. App. 5a), and that this evidence might lead a jury to find that petitioner's proffered justification was a pretext for discrimination. The court below thus followed this Court's admonition that "summary judgment will not lie if a dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Whatever the merits of the court of appeals' assessment of the record, its legal analysis was entirely sound.

ARGUMENT

This is an unexceptional case. In finding an award of summary judgment inappropriate, the court of appeals properly judged the record here under the standard for resolving Title VII (and thus ADEA)[4] cases that has repeatedly been

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[4] "[T]he substantive provisions of the ADEA 'were derived *in haec verba* from Title VII' 'and apply with equal force.' " *Trans World Airlines* v. *Thurston*, 469 U.S. 111, 121 (1985) (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978)). As petitioner notes (Br. 12-13 n.5), the courts

applied by this Court. Petitioner's challenge to the holding below therefore amounts, at bottom, to a double-barreled attack on established Title VII doctrine and on the court of appeals' assessment of the facts of record in light of that doctrine. Both aspects of that challenge should be rejected.

1. This Court, in a series of cases beginning with *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), has set forth the "allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment." *Texas Dep't of Community Affairs* v. *Burdine,* 450 U.S. 248, 252 (1981). This three-step procedural framework has become familiar.

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Id. at 252-253 (quoting *McDonnell Douglas,* 411 U.S. at 802).

This Court also has fleshed out the nature of the inquiry at each step of *McDonnell Douglas* framework. As both courts below recognized, a plaintiff in an ADEA action may make out a prima facie case of discrimination by showing that he is in the protected class (that is, that he is between 40 and 65 years of age), that he was qualified for a given position, that he was denied the position (or subjected to

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accordingly have, with rare exceptions, applied the *McDonnell Douglas* framework in ADEA cases.

some other adverse personnel action), and that a younger person received favorable treatment vis-a-vis the same or an equivalent position. See *Burdine*, 450 U.S. at 253 & n.6; *McDonnell Douglas,* 411 U.S. at 802. Establishment of a prima facie case raises a presumption that the plaintiff was a victim of discrimination. See *Burdine,* 450 U.S. at 254. The burden then passes to the defendant to "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason" (*ibid.*). At this second stage of the process, "[t]he defendant need not persuade the court that it was actually motivated by the proferred reasons" (*ibid.*); the employer "need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus" (*id.* at 257). See *Board of Trustees* v. *Sweeney,* 439 U.S. 24, 25 n.2 (1978). If the defendant satisfies this burden, "the presumption raised by the prima facie case is rebutted" (*Burdine*, 450 U.S. at 255).

The case then moves to the third stage of the *McDonnell Douglas* formulation—the one directly at issue in this case—where the plaintiff is given "the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision" (*Burdine*, 450 U.S. at 256). The plaintiff "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence" (*ibid.*). See *United States Postal Service Board of Governors* v. *Aikens,* 460 U.S. 711, 716 (1983). A plaintiff thus may establish pretext within the meaning of *McDonnell Douglas* and *Burdine* simply by showing that the employer's proffered explanation is unbelievable: "the *McDonnell Douglas* framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that

the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision" (*Aikens*, 460 U.S. at 718 (Blackmun, J., concurring)).

In this case, the court of appeals faithfully followed the approach set out in *McDonnell Douglas* and *Burdine*. It is conceded that respondent made out a prima facie case of age discrimination, and it is plain that petitioner offered evidence supporting a legitimate reason for its decision to retain (and then recall) Faust rather than respondent. Turning to the third step in the *McDonnell Douglas* framework, the court of appeals held that summary judgment for petitioner was inappropriate because "the record * * * contains 'evidence of inconsistencies and implausibilities in the employer's proferred reasons for discharge (which) reasonably *could* support an inference that the employer did not act for (those) nondiscriminatory reasons' " (Pet. App. 2a (citation omitted; emphasis in original)). In particular, the court pointed to evidence that Faust spent only a relatively small percentage of his time doing the things that respondent was not trained to do.[5] This evidence, the

[5] Petitioner's statement that "Faust worked less than 25 percent of his time on projects for which Respondent was not trained" (Br. 20) is somewhat misleading. Faust's deposition testimony indicated that he spent approximately 75% of his time doing installation work (C.A. App. 325a). Much of the remainder of his time was spent writing reports of installations – a type of work that had been done by all installation specialists, including respondent (*id.* at 326a). In addition, Faust did "some gofer work like getting drawings out to the works, to salesmen" (*ibid.*). Faust indicated that he spent only a small percentage of his time on his remaining duties, which included filing and "working on margins" (*id.* at 325a, 326a). The record therefore suggests that Faust devoted a fairly small amount of time to duties for which his special skills were relevant. Exactly how much of his time was spent on those duties is unclear; the record shows only that it was considerably less than 25% but greater than zero. A more accurate assessment of how much time Faust actually spent working on margins or other tasks that respondent was not trained to do is a key unresolved issue of material fact that could be addressed at trial.

court found, "is inconsistent with [petitioner's] expressed need for diverse skills" and therefore "raises a question of fact as to whether [petitioner] really believed that Faust's 'varied' experience made him more qualified than [respondent]" (*id.* at 5a). The court accordingly concluded that evidence of the duties actually performed by Faust could lead a jury to "find [petitioner's] asserted reason for preferring Faust to be pretextual" (*ibid.*).

The court of appeals thus reasoned, sensibly enough, that an examination of the duties an employer actually assigns to its employee may shed light on the employer's motivation in recalling that employee. Because petitioner did not (for the most part) assign Faust duties that called for use of his experience as a sales correspondent, the court concluded that a jury might find petitioner to be dissembling when it stated that Faust's training in that area was the reason for his recall. In the language of *Burdine*, then, the court of appeals held only that the question whether "[petitioner's] proffered explanation is unworthy of credence" (450 U.S. at 256) should be put to the jury. Of course, it is possible to challenge the court of appeals' assessment of the facts of record; it is arguable that respondent's evidence – which did not refute the contention that petitioner used Faust's office skills at least some of the time – was not sufficiently probative to raise real doubts about petitioner's veracity. But that sort of assessment of the record is one that this Court typically leaves for the lower courts. See generally *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 327 (1986).[6] There is no special reason to depart from that practice here, and that should be the end of this case.

[6] This is not a case where the court of appeals set aside the district court's factual findings. The district court did not determine that an

2. Petitioner nevertheless makes two arguments relating to the ADEA in challenging the decision below. Petitioner asserts, first, that the evidence used by a plaintiff at the third *McDonnell Douglas* stage to disprove an employer's proffered nondiscriminatory explanation for its action must *itself* tend to establish discrimination; it is not enough, petitioner asserts, for the plaintiff to show only that the employer's stated explanation was not believable. Second, petitioner asserts that respondent's evidence of pretext in this case—evidence of the duties petitioner assigned to Faust after he was recalled—may not be taken into account because that evidence somehow involves a consideration of petitioner's business judgment. Neither of these arguments has merit.

a. The precise contours of petitioner's first argument (Pet. Br. 12-18)) are hazy. Petitioner recognizes that, even at the third *McDonnell Douglas* stage, an ADEA plaintiff "need not produce direct evidence of discriminatory intent" (Br. 14), and this observation plainly is correct. See *Aikens*, 460 U.S. at 714 n.3; *Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977). At the same time, however, petitioner nevertheless seems to assert (Br. 15-16) that the evidence used to establish pretext must itself tend to prove discrimination. Petitioner therefore appears to believe (see *id.* at 17) that evidence showing only that the employer's stated rationale is not its real rationale—rather than affirmatively showing that the real rationale is discrimination—cannot be used to establish pretext. Evidence that is itself probative of discrimination, petitioner concludes, must be offered at the third *McDonnell Douglas* stage "to forge [a] link between the challenged decision and age discrimination" (Br. 18).

inference of pretext on the part of petitioner could not reasonably be drawn from respondent's evidence about Faust's actual post-recall duties. Instead, the district court awarded petitioner summary judgment because, even in light of respondent's evidence, petitioner's proffered explanation remained "plausible" (Pet. App. 17a). As the court of appeals explained, however, at the summary judgment stage "[t]he question is not whether the employer's asserted reason is plausible, but whether there is also evidence of record which, if credited, could render the reason implausible" (*id.* at 5a-6a). See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); pages 17-20, *infra*. The court of appeals found such evidence here (Pet. App. 5a, 6a).

This argument, in our view, amounts to little more than an oblique attack on established Title VII doctrine. Petitioner's assertion that direct evidence of discrimination must come into the case at the third *McDonnell Douglas* stage is simply inconsistent with the Court's observation in *Burdine* that a plaintiff may establish pretext "indirectly by showing that the employer's proffered explanation is unworthy of credence" (450 U.S. at 256). See *Aikens*, 460 U.S. at 718 (Blackmun, J., concurring).[7] Moreover, the Court's observation in *Burdine* follows logically from the *McDonnell Douglas* framework. Evidence establishing a prima facie case under the ADEA, if unrebutted by the defendant, entitles the plaintiff to judgment on the merits. *Burdine*, 450 U.S. at 254. And if the plaintiff shows that the defendant's proffered explanation is a pretext, he should be left, at the very least, in the same position he would be in if he had established an unrebutted prima facie case. Cf. Fed. R. Evid. 301. Indeed, such a showing by the plaintiff should, if anything, strengthen his case, since a defendant who offers an unbelievable response to an accusation of discrimination is likely to have something to hide—something that,

[7] Of course, a plaintiff also may establish pretext by adducing direct evidence of discrimination. See *McDonnell Douglas*, 411 U.S. at 804-805.

in the context of an ADEA action, is likely to be improper animus.[8]

The nature of a prima facie case under the ADEA also points up a fundamental flaw in petitioner's reasoning: direct evidence of improper animus is *not* necessary to "forge [a] link between the challenged decision and age discrimination" (Pet. Br. 18) because such a link is already forged by the establishment of a prima facie case. The Court has recognized that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes" (*Aikens*, 460 U.S. at 716). It therefore developed a framework that requires a plaintiff to "eliminate[ ] the most common nondiscriminatory reasons for the plaintiff's rejection" (*Burdine*, 450 U.S. at 254) by establishing the prima facie case. When the plaintiff makes out such a prima facie case, the Court reasoned, it is "more likely than not" that the defendant's action was the result of discrimination. *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 576, 577 (1978). See *Trans World Airlines* v. *Thurston*, 469 U.S. 111, 121 (1985). That is why establishment of the prima facie case "creates a presumption that the employer unlawfully discriminated against the employee" (*Burdine*, 450 U.S. at 254).[9]

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[8] It is possible that an employer might lie about its reasons for discharging an employee even when its real reason is not discriminatory animus. See, *e.g.*, *Dea* v. *Look*, 810 F.2d 12, 14-15 (1st Cir. 1987) (employee asserted that he was dismissed in an attempt to shift the blame for pilferage from superiors). If that real reason is established in the course of the plaintiff's attempt to show pretext, however, it will "merely provide another reason, totally unrelated to age, for [the employee's] discharge" (*id.* at 15), and it accordingly will defeat the plaintiff's case. If, on the other hand, the proffered reason for the employer's action is disproved while the real reason is not apparent from the record, the prima facie case that remains ought to go forward.

[9] So far as we are aware, the First Circuit is the only court that has expressed the view that a plaintiff must do more than demonstrate that the employer's proffered rationale is invalid, and it has done so only in dicta. See *Dea*, 810 F.2d at 14-15 (plaintiff himself supplied nondiscriminatory rationale for employer's action); *White* v. *Vathally*, 732 F.2d 1037, 1042-1043 (1st Cir.), cert. denied, 469 U.S. 933 (1984) (the defendant's "proffered explanation was not clearly 'unworthy of credence' "). Indeed, the First Circuit also has recognized that " '[a] weak correlation between the articulated criteria [for filling a job] and job performance may support an inference that the employer's proffered explanation was a pretext for illegal discrimination,' " although " 'it does not compel such an inference' " (732 F.2d at 1040 (citation omitted)).

Of course, "[a] satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence" (*Burdine*, 450 U.S. at 255 n.10). But that does not mean, as petitioner seems to assert (Br. 18), that the mere proffer of a legitimate reason for the defendant's action eliminates all evidence from the case on which the jury could base a finding of discrimination. Once the defendant proffers its explanation, the jury may look to the entire record, including the evidence that made up the prima facie case and "inferences properly drawn therefrom" (*Burdine*, 450 U.S. at 255 n.10), in order to determine whether the defendant's explanation is pretextual. "Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." *Ibid.*[10] The evidence that established respondent's prima facie case here thus provides the link between discriminatory animus and petitioner's actions. If petitioner's proffered explanation is discredited, that link remains intact.

b. Petitioner's second argument under the ADEA—that the court of appeals somehow second-guessed petitioner's

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[10] This is not to say that every action in which a prima facie case is established should go to the jury: as we explain below (pages 19-20, *infra*), a district judge may grant summary judgment to the defendant if he concludes, after reviewing all of the evidence in the record, that a rational jury could not find the employer's proffered justification to be pretextual.

business judgment when it considered evidence of Faust's actual post-recall duties (Br. 19-20)—is grounded on a misstatement of the use to which that evidence was put. It is true, of course, that a plaintiff, to establish pretext at the third *McDonnell Douglas* stage, must do more than "show that the employer made an unwise business decision, or an unnecessary personnel move" (*Gray* v. *New England Tel. & Tel. Co.*, 792 F.2d 251, 255 (1st Cir. 1986)); "[t]he employer's stated legitimate reason must be reasonably articulated and nondiscriminatory, but does not have to be a reason that the judge or jurors would act on or approve." *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979). See *Jorgensen* v. *Modern Woodmen of America*, 761 F.2d 502, 505 (8th Cir. 1985); *Parcinski* v. *Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), cert. denied, 459 U.S. 1103 (1983). Cf. *Burdine*, 450 U.S. at 259. Here, however, respondent is not arguing that petitioner was *unwise* in thinking that it would need an employee with training as a sales correspondent; respondent instead wants to use Faust's post-recall duties as indirect evidence that petitioner *never* had any intention of using Faust as a sales correspondent.

Petitioner nevertheless seems to argue that evidence of actions taken by the employer after it made the challenged employment decision never may be used to establish pretext; if such evidence may be considered, petitioner argues, "an employer can never prevail on summary judgment * * * if it makes a less than perfect assessment of its future personnel needs" (Br. 20). This contention, however, ignores the " 'established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.' " *United Mine Workers* v. *Pennington*, 381 U.S. 657, 670 n.3 (1965) (quoting *Federal Trade Comm'n* v.

Cement Institute, 333 U.S. 683, 705 (1948)). Moreover, petitioner's fears are overstated, since the strength of the inference of pretext that may be drawn from the employer's conduct will vary from case to case.[11] At the same time, petitioner's approach would have a perverse effect of its own: it would entitle an employer to summary judgment whenever the employer is able to articulate any reason for the challenged decision that hinges on the employer's future plans or expectations.

An extreme hypothetical case makes this clear. An employer might contend, for example, that it retained a younger employee rather than an older one because the younger employee had training as a scuba diver; the employer might justify this action with the explanation that at the time it made this decision it intended to begin operating an underwater salvage service. Under petitioner's approach, the judge and jury would not be allowed to consider evidence that the employer never began operating such a service—and that the younger employee never used his scuba skills—in determining whether the employer's rationale was a pretext (see Br. 23). But an employer's actual conduct surely sheds at least some light on its past intentions. So long as the judge and jurors are aware that their "focus is to be on the employer's motivation * * * and not on its business judgment" (*Loeb*, 600 F.2d at 1012 n.6), there is no reason to deny them use of this sort of highly probative evidence.

3. Finally, petitioner contends (Br. 21-26) that the court of appeals departed from the summary judgment standards set out in Fed. R. Civ. P. 56. This contention again turns on a misstatement of the holding below. Rule 56 requires the entry of summary judgment "against a party who fails

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[11] Indeed, as we suggest above, in our view it is a close question whether the courts below would have been justified in awarding summary judgment to petitioner on the facts of this case.

to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" (*Celotex Corp.*, 477 U.S. at 322). Here, the court of appeals found that respondent made the showing necessary to survive petitioner's summary judgment motion by making out a prima facie case of discrimination and by introducing evidence that "raises a question of fact as to whether [petitioner] really believed that Faust's 'varied' experience made him more qualified than [respondent]" (Pet. App. 5a; see *id.* at 6a (evidence "could cast doubt on [petitioner's] assertion that Faust was retained because of his more diverse skills")). In the court of appeals' view, petitioner therefore advanced facts (those making up its prima facie case) that would (in the absence of a legitimate, nondiscriminatory explanation) justify a jury in finding discrimination, as well as evidence that could lead a rational jury to reject petitioner's proffered explanation as a pretext—evidence, in other words, that could lead a jury to find for respondent on every element essential to his case.

The court of appeals thus did no more than follow this Court's admonition that "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Since "[c]redibility determinations, the weighing of evidence, and the drawing of inferences from the facts are jury functions, not those of a judge" (*id.* at 255)—and since "all justifiable inferences are to be drawn in [the nonmovant's] favor" on a motion for summary judgment (*ibid.*)—the court of appeals' approach was entirely proper, given its conclusion that the evidence raised doubts about petitioner's motivation.[12]

[12] Petitioner contends (Br. 22) that the court of appeals required it to disprove respondent's case. That is not correct: an examination of the court's opinion (Pet. App. 5a-6a) shows that the court found the crucial question to be whether respondent had produced "evidence of record which, if credited, could render [petitioner's explanation] implausible." Petitioner also contends (Br. 22-24) that there is no genuine issue of fact in dispute here because, in its view, "[w]hat Faust did after recall is immaterial to [petitioner's] intent when it decided—a year earlier—to retain a multi-skilled employee" (*id.* at 23). But this is simply a disagreement with the court of appeals' factual conclusions about the inferences that might reasonably be drawn from petitioner's conduct. Those inferences need not be compelling for the case to survive a motion for summary judgment: " 'the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial' " (*Anderson*, 477 U.S. at 248-249 (quoting *First Nat'l Bank* v. *Cities Service Co.*, 391 U.S. 253, 288-289 (1968)).

The conclusion that the decision below applied the proper legal standard under Rule 56 should not denigrate the value of summary judgment procedures in screening out nonmeritorious claims prior to trial. A plaintiff in an ADEA action is obligated to oppose the defendant's motion for summary judgment with something more than a self-serving assertion that the defendant's proffered explanation is a pretext (see, *e.g.*, *Dale* v. *Chicago Tribune Co.*, 797 F.2d 458, 464-465 (7th Cir. 1986), cert. denied, 479 U.S. 1066 (1987)). He "must do more than simply show that there is some metaphysical doubt as to the material facts. * * * Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986) (citation omitted). But respondent, in the view of the court of appeals, made the necessary showing by establishing that petitioner's actions were (at least in large part) incon-

sistent with its proffered explanation of its decision to recall Faust. Whatever the merits of the court's assessment of the record, its legal analysis was entirely sound.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 87-271

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC.,
Petitioner,
v.
EUGENE F. BRIECK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae in support of the Petitioner. The written consents of all parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide assocation of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. Its governing body is a Board of Directors composed of experts and specialists in equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment opportunity programs and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its trade association members, are employers subject to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* and Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to charges of discrimination pursuant to the ADEA and Title VII, EEAC's members are interested in the extent to which an employer's business judgment may be attacked as a pretext for discrimination under this Court's decisions in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Thus, the issues presented in this appeal are extremely important to the nationwide constituency which EEAC represents. The court below, relying on its prior decision in *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir.), *cert. dismissed*, 108 S.Ct. 26 (1987), allowed the plaintiff to survive summary judgment merely by questioning his employer's judgment as to the company's need for a more versatile employee following a reduction in force. This position is inconsistent with this Court's holding in *Burdine* that the plaintiff bears the ultimate burden of proving intentional discrimination, and also requires the defendant employer to prove the absence of a discriminatory motive, in conflict with *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978) (per curiam).

Because of its interest in the application of the nation's civil rights laws, EEAC has filed over 230 briefs as amicus curiae in cases before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this amicus activity, EEAC has participated in several cases involving the burden of proof in discrimination cases, including *Burdine*; *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); and *U.S. Postal Service Board of Governors*

v. Aikens, 460 U.S. 711 (1983). Furthermore, a number of the other cases in which EEAC has participated have involved the proper interpretation of the ADEA. *See, e.g., Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *Lorillard v. Pons*, 434 U.S. 575 (1978); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977); *Burns v. Equitable Life Assurance Society of the United States*, 696 F.2d 21 (2d Cir. 1982), *cert. denied*, 464 U.S. 933 (1983). See also *McLaughlin v. Richland Shoe Co.*, No 86-1520, *cert. granted*, October 6, 1987, 56 U.S.L.W. 3242, (*decision pending*) (standard for willful violations under the FLSA, Equal Pay Act and ADEA).

STATEMENT OF THE CASE

Petitioner Harbison-Walker Refractories ("Harbison-Walker") sells specialized ceramic brick products, primarily to the domestic steel industry. Joint Appendix ("J. App.") at 12. Harbison-Walker hired Respondent Eugene Brieck in June 1965 as an installation specialist in the Iron and Steel Marketing Support Group ("Steel Group"). Appendix to the Petition for Certiorari ("Pet. App.") at 336a. Brieck was one of four installation specialists, whose duties were to supervise the installation of Harbison-Walker products in steel making furnaces, train the customer's employees in operations and maintenance, and resolve complaints. *Id.*

As a result of the decline in the domestic steel industry, Harbison-Walker's sales fell dramatically between 1979 and 1982, forcing Harbison-Walker to cut its workforce to minimize losses. J. App. at 12. Harbison-Walker first instituted a voluntary retirement program in April 1982. J. App. at 12-13. Further reductions were necessary, however, and in June 1982, management decided to reduce its remaining salaried workforce by ten percent. J. App. at 13.

Six employees in the Steel Group were selected for layoff in July 1982, including two of the four installation specialists, Brieck (age 55) and W. E. Meixell (age 59).

Pet. App. at 13a. Harbison-Walker's primary consideration in determining which employees to furlough and which to retain, according to William Sekeras, then Manager of the Steel Group, was "the ability of employees to perform the job functions remaining in the reduced business setting." J. App. at 13. Meixell had only been with Harbison-Walker since 1980 and therefore had the least seniority and experience. J. App. at 105. Of the remaining three, Malarich had broader experience than Brieck and was judged from past performance to be more capable. *Id.* Faust, a Harbison-Walker employee since 1966, had multi-functional capabilities, based upon his prior experience as a sales correspondent, his superior work with records and reports, and his singular experience with installation work in blast furnace casthouses. J. App. at 14. Faust also had higher performance evaluations than Brieck. J. App. at 15.

As business continued to decline, Malarich was laid off in July and Faust in November. Pet. App. at 13a. When business began to improve in July 1983, Faust was recalled for the same reasons that he had been temporarily retained the previous summer. J. App. at 15.

Brieck contends that Harbison-Walker's decision to lay him off and recall Faust constitutes age discrimination. Brieck filed suit under the ADEA. Following discovery, the U.S. District Court for the Western District of Pennsylvania granted summary judgment in favor of Harbison-Walker, holding that Brieck had failed to show that Harbison-Walker's justification was a pretext for age discrimination. Pet. App. at 12a. The U.S. Court of Appeals for the Third Circuit reversed. Holding that the district court had incorrectly required Brieck to establish a direct inference of age discrimination, the Third Circuit concluded that "an ADEA plaintiff's evidence need only permit a reasonable inference that the employer's proffered explanation for the discharge is unworthy of credence" to survive summary judgment. Pet. App. at 2a.

SUMMARY OF ARGUMENT

Federal civil rights laws were never intended to supersede traditional management prerogatives to make business decisions concerning employees, as long as those decisions are not tainted by discriminatory intent. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). *See also United Steelworkers v. Weber*, 443 U.S. 193, 206 (1979). Accordingly, while this Court allows a plaintiff to raise an inference of discrimination merely by showing that he or she was treated differently than another person outside a protected class, the presumption "drops from the case" when an employer articulates a legitimate, nondiscriminatory reason for its decision. *Burdine*, 450 U.S. at 255 n. 10. The plaintiff must then show that the employer's reason is actually a pretext for discrimination. *Id.* at 253.

While a plaintiff may prove pretext indirectly by showing that the employer's reason is "unworthy of credence," this method is limited to those cases in which the reason may be objectively proven false. In contrast, when the employer's decision was a business judgment based on subjective factors, the plaintiff does not present a genuine issue of fact for trial merely by challenging the wisdom of that judgment. *Dea v. Look*, 810 F.2d 12 (1st Cir. 1987).

Whether filling an open position or implementing a reduction in force, an employer often must choose from among a number of qualified candidates. Thus, a number of necessarily subjective factors play a role in the decision, including opinions as to past performance, the value of prior experience and qualifications, and the company's needs in relation to the position in question. In each such situation, the person most qualified to make the judgment is that person selected by the employer, based on his own expertise, to select the appropriate person for the job. Rarely will that selection be immune to attack from a plaintiff who would prefer to substitute his own subjective analysis. However, the mere asser-

tion that some factors should have been given more weight than others, or that the decision-maker misperceived the requirements of the position filled, do not render that decision "unworthy of credence."

As in cases arising under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, those seeking relief under the Age Discrimination In Employment Act of 1967, *as amended*, 29 U.S.C. § 621 *et seq.*, must demonstrate that an illegal characteristic was a determining factor in an adverse employment decision. *Dale v. Chicago Tribune Company*, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 954 (1987). In order to survive summary judgment, the plaintiff must show that there is a genuine issue of fact for trial. *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). Merely inviting a jury to second-guess the employer's business judgment does not present a triable issue of fact.

The court below found a credibility issue in that Harbison-Walker may have failed to accurately assess the requirements of a position remaining after a reduction in force. Holding that a jury could find the employer's explanation to be "unworthy of credence," the Third Circuit reversed a grant of summary judgment, concluding that if the duties performed by the selectee did not conform to those predicted by the employer, as detailed in its articulated explanation, an inference of discrimination could arise.

Since the plaintiff in fact attacked his employer's business judgment, the Third Circuit's conclusion conflicts with the ADEA, which only prohibits employment actions based on age, 29 U.S.C. § 623, and with this Court's holding in *Burdine*, which requires the plaintiff to prove intentional discrimination and also cautions against interference with management prerogatives. Moreover, the court below concluded that the employer's burden on summary judgment is to show that the plaintiff will be unable to produce direct evidence of discrimination or to

show that the employer's reason is subject to factual dispute, contrary to this Court's holding in *Celotex* that the moving party need not produce evidence negating the opponent's claim.

ARGUMENT

I. AN ADEA PLAINTIFF, WHO BEARS THE ULTIMATE BURDEN OF PROVING INTENTIONAL DISCRIMINATION, CAN NOT AVOID SUMMARY JUDGMENT MERELY BY QUESTIONING THE EMPLOYER'S BUSINESS JUDGMENT.

A. *Burdine* Requires A Showing Of Pretext *For Discrimination.*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits discrimination in employment on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2. Similarly, the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, prohibits discrimination based on age. 29 U.S.C. § 623. Neither statute, however, authorizes recovery merely because an employer's legitimate exercise of managerial discretion adversely affected a member of a protected class. Both Title VII and the ADEA provide a remedy only when the action complained of was taken "because of" the illegal criterion.[1]

In a series of decisions beginning with *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973) and continuing through *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court has developed a method to allow a plaintiff, in appropriate cases, to demonstrate disparate treatment and violation of employment discrimination laws "despite the

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[1] Under § 703(a) of Title VII, it is an unlawful employment practice for an employer to discriminate against an employee "*because of* such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (emphasis supplied). The ADEA prohibits discrimination against any individual "*because of* such individual's age." 29 U.S.C. § 623(a) (emphasis supplied).

unavailability of direct evidence." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979). Recognizing that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983), so that direct, "smoking gun" evidence is often unavailable, this Court has instead developed "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 577 (1978).

McDonnell Douglas established the basic order of proof. As this Court explained in *Burdine*:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.*, at 802, 93 S.Ct. at 1824. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.*, at 804, 93 S.Ct. at 1825.

450 U.S. at 252-53. The Court in *McDonnell Douglas* enumerated the factors which make up the plaintiff's prima facie case in a claim of racial discrimination in hiring under Title VII.[2] The specific requirements, however, necessarily will vary with the facts of the case.

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[2] The Court articulated plaintiff's initial burden as follows:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802.

McDonnell Douglas at 802 n. 13.[3] Establishment of the prima facie case eliminates "the most common nondiscriminatory reasons for the plaintiff's rejection," *Burdine*, 450 U.S. at 254, such as plaintiff's lack of qualifications or unavailability of the position. The effect of plaintiff's prima facie case, then, is to create a "legally mandatory, rebuttable presumption" of intentional discrimination. *Id.* at n. 7.

The burden then shifts to the employer to state its reasons for taking the contested employment action. *Id.* In so doing, the employer rebuts the presumption created by plaintiff's prima facie case, and the presumption then "drops from the case." *Id.* at 255, n. 10. Plaintiff will then have the opportunity to demonstrate that the employer's reasons were actually "a pretext for discrimination." *Id.* at 253. *See also Furnco*, 438 U.S. at 578. The term "pretext" does not mean that the plaintiff must show that the discriminatory reason was the sole factor in the employer's decision, but merely that it was a "but for" cause. *McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273, 282 n. 10.

The ultimate burden of proving intentional discrimination never shifts from the plaintiff. *Burdine*, 450 U.S.

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[3] For example, in *Burdine*, where the plaintiff alleged that she was denied a promotion and terminated because her sex, this Court adapted the *McDonnell Douglas* formula to a charge of failure to promote, stating that "The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." 450 U.S. at 253. Similarly, an ADEA plaintiff must establish a prima facie case by showing that (1) he was a member of the protected class; (2) he was discharged; (3) he was qualified for the position; and (4) he was replaced by a younger person. *Ackerman v. Diamond Shamrock Corporation*, 670 F.2d 66, 69 (6th Cir. 1982). *See also Douglas v. Anderson*, 656 F.2d 528 (9th Cir. 1981) (an ADEA plaintiff satisfies the fourth prong of the *McDonnell Douglas* test by showing that he was replaced by a substantially younger employee with equal or inferior qualifications).

at 253. Thus, once the employer has explained its conduct, "the factual inquiry proceeds to a new level of specificity," *id.* at 255, and the plaintiff's burden of proving pretext merges with the ultimate burden of proof. *Id.* at 256.

In short, the real issue in every employment discrimination case of disparate treatment is whether or not the employer has intentionally based an employment decision on an illegal criterion. When the employer has presented facially valid reasons for its conduct, the plaintiff must in turn show that those reasons "were in fact a coverup for a . . . *discriminatory* decision." *McDonnell Douglas*, 411 U.S. at 805 (emphasis supplied). In fact, the plaintiff is required to prove by a preponderance of the evidence that an illegal criterion was "the determining factor" in the employment decision. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979).

B. Employment Discrimination Laws Were Not Intended To Preclude Legitimate Managerial Discretion.

Most if not all employment-related decisions are based on the employer's desire to choose the best person for the job. *See Furnco*, 438 U.S. at 577 ("We know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.") The purpose of anti-discrimination legislation is to ensure that those decisions are made without consideration of illegal and inappropriate factors such as race, sex or age. *See, e.g. Griggs v. Duke Power Company*, 401 U.S. 424, 431 (1971). "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions." *McDonnell Douglas*, 411 U.S. at 801. Absent use of illegal criteria, however, Title VII and the ADEA were not designed to supplant managerial discretion by forcing employers to prefer candidates with protected characteristics solely

because of those characteristics. Referring to Title VII, this Court has said that "The statute was not intended to 'diminish traditional management prerogatives.'" *Burdine*, 450 U.S. at 259 (quoting *United Steelworkers v. Weber*, 443 U.S. at 207.)

Indeed, the legislative history of Title VII reveals that it would not have been enacted without recognition of, and preservation of, managerial discretion in employment decisions.

> Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible." H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963), U.S. Code Cong. & Admin. News 1964, p. 2391.

United Steelworkers v. Weber, 443 U.S. 193, 206 (1979).[4]

Likewise, the ADEA was not intended to supersede traditional management prerogatives.[5] Accordingly, Title VII and the ADEA preserve the employer's right to make decisions based on his own business judgment. "An em-

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[4] *See also Local Number 93, International Association of Firefighters, AFL-CIO CLC v. City of Cleveland*, 106 S.Ct. 3063 (1986) (Congress sought to avoid undue federal interference with managerial discretion); *Johnson v. Transportation Agency, Santa Clara County, California*, 107 S.Ct. 1442 (1987) (Stevens, J., concurring).

[5] *See, e.g., Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) ("The Age Discrimination in Employment Act, however, was not intended as a vehicle for judicial review of business decisions."); *Parcinski v. The Outlet Company*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983) ("The Age Discrimination in Employment Act does not authorize the courts to judge the wisdom of a corporation's business decisions."); *Jorgensen v. Modern Woodmen of America*, 761 F.2d 502, 505 (8th Cir. 1985) ("The ADEA is not intended to be used as a means of reviewing the propriety of a business decision").

ployer is entitled to make his own policy and business judgments, and may, for example, fire an adequate employee if his reason is to hire one who will be even better, as long as this is not a pretext for discrimination." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n. 6 (1979).

C. When The Employer's Reason Is Within The Realm Of Management Prerogative, The Plaintiff Should Be Required to Do More Than Attack That Reason to Survive Summary Judgment.

1. *Proof Of Pretext By Showing That The Employer's Reason Is Unworthy Of Credence Is Limited To Those Cases In Which The Employer's Reason Can Be Objectively Demonstrated To Be False.*

In *Burdine*, this Court explained that pretext may be demonstrated "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256. Under this Court's analysis it is clear that a discrimination plaintiff may only prevail if he is able to show that the employer's reasons were in fact a pretext *for discrimination*. The fact that an employer's personnel decision may be vulnerable to criticism because it is necessarily based on subjective factors does not thereby render it "unworthy of credence." Therefore, only those plaintiffs who demonstrate that the employer's reason is objectively false should be permited to prevail under the "unworthy of credence" prong of this Court's "pretext" test.

When there is direct evidence of possible discriminatory motivation, the plaintiff need not question the employer's reason, but merely presents evidence that there were other, discriminatory reasons which more likely motivated the employer.[6] Direct evidence is rarely available, however, so that a plaintiff faced with the necessity of proving pretext will probably mount an attack on the employer's reasons. When a plaintiff thus relies solely on the second *Burdine* alternative, this Court's use of the phrase "unworthy of credence" in *Burdine* becomes crucial.

Since the plaintiff's burden of proving pretext merges with his ultimate burden of showing intentional discrimination, a fair reading of *Burdine* and the related decisions indicates that to prove an employer's reason "unworthy of credence" requires a showing that it can be objectively proven false. First, the employer's burden is merely one of production; it "need not persuade the court that it was actually motivated by the proffered reasons." *Burdine*, 450 U.S. at 254. Therefore, to allow the plaintiff to prevail merely by contesting the wisdom of the employer's reasons, with no evidence whatsoever of actual discriminatory intent, "would impose on the defendant an almost impossible burden of proving 'absence of discriminatory motive,'" which this Court declined to do in *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978) (per curiam). *White v. Vathally*, 732 F.2d 1037, 1043 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984).[7] Moreover, permitting the plaintiff to succeed merely by casting doubt on the employer's reason "would improperly revive the presumption in plaintiff's favor which was raised by the prima facie showing but 'dispel[led] by the defendant's articulation of reasons." *Id.* (citing *Furnco*, 438 U.S. at 578).

A plaintiff could demonstrate that the employer's reason is false by showing that a cited incident was far removed in time, or that the reason also applied to another employee who was not discharged. Or, if the plain-

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[6] In *McDonnell Douglas*, for example, this Court suggested that the plaintiff might show that white employees who engaged in similar conduct were retained while plaintiff was terminated, or evidence of the employer's practices regarding minority employment. 411 U.S. at 804.

[7] *See also Dea v. Look*, 810 F.2d 12 (1st Cir. 1987).

tiff can show that the employer's reason is a complete fabrication, created after the fact to conceal the real reason, it may lead to the conclusion that the real reason was discriminatory. "If the employer is trying to hide its real reason, that effort—coupled with the evidence making up the employee's prima facie case—may convince the trier of fact that the real reason needed to be hidden and therefore probably was discriminatory." *Pollard v. REA Magnet Wire Company, Inc.*, 824 F.2d 557, 559 (7th Cir.), *cert. denied*, 108 S.Ct. 488 (1987).

There is much less reason to let the case go to trial, however, when the plaintiff merely attacks the wisdom of his employer's legitimate business decision. In many employment situations, the outcome will be based on the decision-maker's perception, based on his prior experience as well as his knowledge of the company's needs and the duties to be performed by the selectee, of the relative merits of a number of qualified candidates. It is precisely in this context that the preservation of management prerogatives is critical. In some situations, the employer's reason rests entirely within the employer's business judgment. Where the plaintiff does not demonstrate that the employer's explanation is fabricated, but merely challenges the wisdom or the accuracy of a business judgment,[8] *Burdine's* careful preservation of traditional management prerogatives precludes recovery.

A number of the courts of appeals have concluded that an unsupported attack on the employer's business acumen will not substantiate the plaintiff's case.

> It is not enough for the plaintiff to show that the employer made an unwise business decision, or an unnecessary personnel move. Nor is it enough to show that the employer acted arbitrarily or with ill will. These facts, even if demonstrated, do not necessarily show that *age* was a motivating factor.

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[8] *See, e.g., Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1427 (7th Cir. 1986) ("A subjective qualification assessment does not convert an otherwise legitimate reason into an illegitimate one.").

Gray v. New England Telephone and Telegraph Co., 792 F.2d 251, 255 (1st Cir. 1986) (emphasis in original) (citing *Chipollini v. Spencer Gifts, Inc.*, 613 F.Supp. 1156 (D.N.J. 1985), *rev'd* 814 F.2d 893 (3rd Cir.), *cert. dismissed*, 108 S.Ct. 26 (1987).[9] The court "does not sit as a super-personnel department that reexamines an entity's business decisions." *Dale v. Chicago Tribune Company*, 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 954 (1987). "It is not the court's duty to determine the validity of the defendant's business decision as long as the decision was made in good faith." *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1426 (7th Cir. 1986).

Thus, when the issue is business judgment, the employee must do more than cast doubt on the correctness of the employer's reasons. *Dea v. Look*, 810 F.2d 12 (1st Cir. 1987). It is not sufficient for an employee to "challenge the judgment of his superiors through his own self-interested assertions." *Dale*, 797 F.2d at 464. A plaintiff cannot refute his employer's reason with his own perceptions of his qualifications or performance.[10]

If the plaintiff is somehow able to substantiate his challenge, for example, by producing witnesses with supervisory authority to support his claims of adequate performance to refute an employer's claim of poor performance, he may be able to show the employer's reason to be "unworthy of credence." However, it should be noted that refuting the facts underlying the employer's conclusion do not necessarily refute the conclusion itself.[11]

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[9] The Third Circuit's decision in *Chipollini* is discussed in detail at p. 23, *infra*.

[10] *See, e.g., Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980) ("[The employee's] perception of himself, however, is not relevant. It is the perception of the decision maker which is relevant.").

[11] In *Pollard v. REA Magnet Wire Company*, 824 F.2d 557 (7th Cir.), *cert. denied*, 108 S.Ct. 488 (1987), the employee demonstrated that his discharge was predicated upon his employer's erroneous belief that he was absent from work without permission to attend a body building event in Las Vegas, when in fact he was absent due

Cases in which the plaintiff is successful in demonstrating that the employer's reasons are "unworthy of credence" have the peculiar result of enabling a plaintiff to prevail without presenting any evidence whatsoever that an illegal criterion was a factor in the employer's decision. *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409-10 (7th Cir. 1984). Since "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," *Burdine*, 450 U.S. at 253, this Court should severely limit the type of case in which a plaintiff may recover without having produced any evidence tending to prove the ultimate fact in issue. Therefore, when an employer has a legitimate, albeit subjective, reason for his decision, which is supported by credible evidence, the plaintiff should not be able to overcome that reason merely by disagreeing with the employer's judgment.

2. *In Order To Survive A Motion For Summary Judgment, A Plaintiff Claiming Age Discrimination Must Do More Than Contest The Employer's Business Decisions.*

As *Burdine* teaches, the plaintiff in a discrimination case bears the ultimate burden of proof of intentional discrimination. This burden cannot be met merely by inviting a jury to second-guess the employer's legitimate business decisions, which fall within the realm of management prerogative unaffected by discrimination laws. Summary judgment is appropriate when there is no genuine issue of fact for trial. Therefore, when the plaintiff can do no more than attack a legitimate, subjective business decision with his own opinions of how the deci-

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to an ankle injury. Holding that "[a] reason honestly described but poorly founded is not a pretext, as that term is used in the law of discrimination," 824 F.2d at 559, the Seventh Circuit reversed the lower court's finding of intentional discrimination. Thus, an employer's decision, if made in good faith, is not a "pretext" merely because it was based on facts which later prove to be incorrect.

sion should have been made, the case is ripe for summary judgment.

Rule 56(c) of the Federal Rules of Civil Procedure, which sets forth the standard for summary judgment, calls for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [12]

This Court developed the appropriate format for analysis of a summary judgment motion in *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986) and *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505 (1986). *Celotex* established that upon the filing of a motion for summary judgment, the moving party need not support the motion with evidence "negating the opponent's claim." Insted, the non-moving party must show that there is a genuine issue for trial. If the non-moving party "fail[s] to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," the moving party is "entitled to judgment as a matter of law." 106 S.Ct. at 2553.

Anderson clarified the phrase "genuine issue as to any material fact," holding that the threshold inquiry "is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reason-

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[12] Rule 56(c) states:

> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

ably be resolved in favor of either party." 106 S.Ct. at 2511. This inquiry "must be guided by the substantive evidentiary standards that apply to the case." *Id.* at 2514.

In a discrimination case, therefore, after the defendant employer has articulated a legitimate non-discriminatory reason for its actions, the plaintiff may survive summary judgment only by demonstrating that a genuine issue of fact remains for trial by showing that the employer's proffered reason is a pretext for discrimination. If there is no direct evidence that a discriminatory reason more likely motivated the employer, the plaintiffs must prove pretext by demonstrating that the employer's explanation is "unworthy of credence." *Burdine*, 450 U.S. at 256.

As explained above, a discrimination plaintiff cannot prove that the employer's stated reason is "unworthy of credence" merely by questioning the wisdom of an otherwise legitimate business judgment. Since proof of pretext is an essential element of the plaintiff's case, summary judgment is appropriate when the plaintiff can provide no response other than an attack on the employer's business judgment.

A number of the Courts of Appeals have affirmed summary judgments in favor of the employer and against an ADEA plaintiff on this basis. In *Dale v. Chicago Tribune Company*, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 954 (1987) the Seventh Circuit affirmed the granting of summary judgment for the employer when the plaintiff produced only "self-interested, conclusory assertions of discrimination" and "dubious statistical evidence," 797 F.2d at 465, and could "point to nothing in the record, besides his own perceptions, to support his assertion that his performance was adequate." 797 F.2d at 464. The plaintiff's affidavit and exhibits asserting that she had higher performance evaluations than the selectee, and that the job description was created after the fact, were insufficient to defeat summary judgment

in *Grigsby v. Reynolds Metals Company*, 821 F.2d 590 (11th Cir. 1987), where the employer presented extensive evidence supporting its decision. Similarly, the First Circuit in *Dea v. Look* affirmed summary judgment when "all that appellant could present was evidence casting doubt on the correctness of the employer's proffered reason for the discharge." 801 F.2d 12, 15 (1st Cir. 1987).[13]

3. *Summary Judgment For The Employer Is Appropriate When A Plaintiff, Terminated As A Result Of A Reduction In Force, Merely Challenges The Employer's Business Judgment.*

The foregoing analysis applies to all cases in which discrimination in employment is claimed, whether the issue is hiring, promotion, transfer, discipline or discharge. However, management discretion is particularly important when an employer, faced with mounting business losses, must reduce its workforce. The employer then has the unpleasant task of evaluating a number of qualified employees to select some for termination. In this situation, the employer must consider primarily the needs of the downsized company and which employees are best suited to serve those needs. The resulting decisions necessarily will be based on subjective factors and evaluations, including past job performance, background and qualifications, and the application of these factors to the requirements of the reduced workforce. Ultimately, qualified employees will be terminated solely for economic reasons. It is easy to see how terminated employees who are members of a protected class, knowing that they met the qualifications for their positions and that they have performed adequately in the past, might think, albeit erroneously, that unlawful criteria were involved in the termination process.

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[13] *See also Askin v. Firestone Tire & Rubber Co.*, 600 F.Supp. 751 (E.D. Ky. 1985), *aff'd*, 785 F.2d 307 (6th Cir. 1986), noting that " 'pretext' must be a pretext for discrimination, not a pretext of some other, ill-advised or unreasonable factor, such as a personality conflict or unreasonably high but evenly applied standards of performance." 600 F.Supp. at 755.

But termination of a qualified employee, even though that employee is a member of a protected class, does not in and of itself establish a prima facie case of discrimination. *LaGrant v. Gulf & Western Manufacturing Company, Inc.*, 748 F.2d 1087 (6th Cir. 1984). Since plaintiffs in job reduction cases often will be unable to show that they were replaced by an individual outside the protected class, a number of courts of appeals have noted that strict application of the *McDonnell Douglas* formula is inappropriate. Accordingly, it has been held that such a plaintiff instead must produce "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).[14]

Assuming, *arguendo*, that the plaintiff is able to raise a presumption of discrimination, the employer can be expected to offer the reduction in force as its explanation. If the plaintiff is unable to meet the employer's reasons with contrary direct evidence, such as a showing that the reduction also greatly reduced the average age of the workforce, the only remaining alternative, under *Burdine*, is to attempt to show that the employer's reason is

[14] *See also LaGrant*, 748 F.2d at 1091 (6th Cir. 1984) (plaintiff in a reorganization case "must come forward with additional direct, circumstantial, or statistical evidence that age was a factor in his termination in order to establish a prima facie case"); *Pace v. Southern Railway System*, 701 F.2d 1383 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983) (when plaintiff cannot demonstrate that he was replaced by a person outside of the protected class because his replacement was more than 40 years of age, the "determination turns on whether the plaintiff has presented sufficient evidence to provide a basis for an inference that age was a factor in the employment decision.") 701 F.2d at 1387; *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 399 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983) (to make out a prima facie case "a plaintiff must demonstrate facts sufficient to create a reasonable inference that age discrimination was 'a determining factor' in the employment decision." 711 F.2d at 342 (quoting *Cuddy v. Carmen*, 694 F.2d 853 (D.C. Cir. 1982).

"unworthy of credence." Where the employer's justification is wholly within the realm of management prerogative, inviting the court or the jury to evaluate the accuracy of the decision does not suffice.

An employer's articulated explanation is not always sacrosanct merely because it is based on a business judgment. For example, when the plaintiff shows that the employer's reason is demonstrably false in an objective evaluation, it follows that the reason *is* "unworthy of credence." For example, the plaintiff may show that a purported reduction in force did not in fact take place. *See, e.g., Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13 (7th Cir. 1987); *Hillebrand v. M-Tron Industries, Inc.*, 827 F.2d 363 (8th Cir. 1987).[15] Or, the employer's reason in and of itself may violate the ADEA. *See, e.g. Metz v. Transit Mix*, 828 F.2d 1202 (7th Cir. 1987) (cost saving is not a legitimate reason for replacing older employee with younger person who can be paid less).

Where, however, the attempt to disprove the employer's explanation is merely an invitation to second-guess the management decisions made by his employer in implementing the reduction in force, the plaintiff cannot prevail absent evidence of discrimination. *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421 (7th Cir. 1986). Therefore, where a plaintiff offers only his own protestations that he should have been selected to remain in the reduced work force, based on his own perceptions of his qualifications and past performance and his opinion of those who remained employed and their relative value to the reduced workforce, he merely challenges his employer's business judgment and has not proven the employer's reason to be "unworthy of credence." *See, e.g., Matthews v. Allis-Chalmers*, 769 F.2d 1215 (7th Cir. 1985).

[15] *See also Christie v. Foremost Insurance Company*, 785 F.2d 584 (7th Cir. 1986), where the employer did not follow its own reduction in force policy and a key decision-maker was unaware that there was such a policy, creating an inference that no legitimate reduction in force actually occurred.

Not surprisingly, several of the courts of appeals have endorsed summary judgment for the employer whose business decisions in implementing a reduction in force have resulted in charges of age discrimination.[16] In *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421 (7th Cir. 1986) the court refused to accept plaintiff's argument that a credibility issue existed when the contested conclusions were matters within the employer's business judgment. When the plaintiff's "termination came about as part of a legitimate economic job reduction" in *Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1218 (7th Cir. 1985), the Seventh Circuit affirmed summary judgment because the plaintiff made no showing of discriminatory motive and intent. The Sixth Circuit reached a similar conclusion in *La Grant v. Gulf & Western Manufacturing Company, Inc.*, 748 F.2d 1087 (6th Cir. 1984) where the plaintiff had no evidence "other than his subjective determination that he was better qualified" to establish that age was a factor in his termination. 748 F.2d at 1091.[17]

In stark contrast to the opinions of the other circuits, the Third Circuit has reversed summary judgment orders in reduction in force cases solely because the plaintiff

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[16] In *Thornbrough v. Columbus and Greenville Railroad Company*, 760 F.2d 633 (5th Cir. 1985), where plaintiff challenged the employer's business judgment in selecting him for termination, the Fifth Circuit reversed a grant of summary judgment upon plaintiff's counsel's protestations that, had the case been permitted to proceed, Thornbrough would have presented witnesses to testify to his qualifications and abilities and cross-examined new and retained employees on their qualifications. *Thornbrough*, however, was decided prior to this Court's decision in *Celotex*, which requires the nonmoving party to establish the elements of his claim in order to defeat a summary judgment motion.

[17] *See also Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983) (summary judgment appropriate when plaintiff intends to attempt to prove pretext by challenging the credibility of the employer's witnesses on cross-examination); *Wehrly v. American Motors Sales Corp.*, 678 F. Supp. 1366 (N.D. Ind. 1988) (granting summary judgment in favor of employer when plaintiff merely challenged employer's view of his qualifications and past performance).

questioned the employer's business judgment.[18] In *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir.), *cert. dismissed*, 108 S.Ct. 26 (1987), the Third Circuit concluded, merely because the employer's reason for discharge was subjective, that "the issue of pretext turns on Spencer's credibility and is not appropriate for resolution on a sumary judgment motion." 814 F.2d at 901.[19] Since the employer's reasons were completely within the realm of management prerogative, it is difficult to see how Chipollini's arguments, which did no more than attack the employer's perceptions of his past performance and future value to the company, supported Chipollini's ultimate burden of proving age discrimination. As Judge Hunter aptly observed in his dissenting opinion, "by allowing Chipollini to overcome Spencer's motion for summary judgment without introducing any evidence

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[18] *See, e.g., Sorba v. Pennsylvania Drilling Company, Inc.*, 821 F.2d 200 (3rd Cir. 1987), *cert. denied*, 56 U.S.L.W. 3461 (1988) (finding jury question on whether employer dismissed plaintiff because it believed his supervisors' reports of poor performance on three projects when plaintiff claimed the results were due to factors beyond his control, and concluding that otherwise it would be more likely than not that the decision was based upon his age); *Jackson v. University of Pittsburgh*, 826 F.2d 230 (3d Cir. 1987), *cert. denied*, 56 U.S.L.W. 3461 (1988) (although plaintiff's only record evidence was his own deposition, his explanations for poor performance, together with post hoc, although non-racial, remarks by supervisor, precluded summary judgment).

[19] The employer's articulated reasons for selecting Chipollini for termination during its force reduction were that (1) his performance evaluations had declined; (2) he was less cooperative and congenial than his replacement; (3) his health problems limited his ability to travel; and (4) he had performed poorly on a recent assignment. *Chipollini v. Spencer Gifts Inc.*, 613 F.Supp. 1156 (D. N.J. 1985), *rev'd*, 814 F.2d 893 (3d Cir.), *cert. dismissed*, 108 S.Ct. 26 (1987). In response, Chipollini argued that (1) he had other evidence of good performance; (2) the employer could offer only a general perception that he was uncooperative, without specific examples; (3) his health problem did not affect his ability to travel; and (4) he had never been specifically assigned to the recent project mentioned by his employer, although he performed those duties. *Chipollini*, 814 F.2d at 901.

pointing to age discrimination, the majority has effectively and impermissibly shifted the burden of persuasion from Chipollini to Spencer." 814 F.2d at 903 (Hunter, J., dissenting).

The conclusion reached by the Third Circuit in *Chipollini* places a monumentally unfair burden on employers, a burden unwarranted by this Court's holding in *Burdine*. Under the *McDonnell Douglas* formula, as discussed by this court in *Burdine*, the employer is merely required to articulate a legitimate reason for its conduct. 450 U.S. at 253. This is a burden of production, not of proof; the employer need not even convince the court that it was "*actually motivated*" by those reasons. *Id.* at 254 (emphasis supplied).

An employer faced with a reduction in force has the regrettable task of choosing, often from a group of qualified employees, those which must be terminated for economic reasons alone. Under these circumstances, the decision necessarily will be based on subjective factors such as the decision-maker's opinion of each employee's past performance and potential for future contributions to the reduced workforce—all legitimate factors, but hardly capable of objective proof other than the decision-maker's testimony that those *were* the reasons, coupled with whatever documentary evidence there may be. Thus, it will be a rare case indeed in which a plaintiff, aided by hindsight, cannot produce "evidence," made up of his own assertions and perhaps with some support, that his employer could and should have used different reasons or placed more weight on some qualifications than others, or that the employer miscalculated the company's future needs. In response, the employer can only stand by his subjective yet legitimate reason.

If each case then turns on the "credibility" of the employer's reason, the employer's burden upon moving for summary judgment will be to prove, beyond a shadow of a doubt, that its business judgment is beyond reproach. A number of significant advantages are already available

to discrimination plaintiffs, namely the ability to make out a prima facie case and create an inference of discrimination without direct evidence, and the right to demonstrate "pretext" using evidence of other possibly biased conduct to persuade the court that a discriminatory reason more likely motivated the employer. If a plaintiff can "prove" the employer's reason to be "unworthy of credence" merely by inviting a jury to second-guess the employer's business decisions, the balance is tipped to an untenable degree. If this further advantage is allowed, it is difficult to imagine a discrimination case in which summary judgment will be proper.

II. THE DECISION TO TERMINATE BRIECK FALLS WITHIN HARBISON-WALKER'S MANAGEMENT PREROGATIVE, SO THAT SUMMARY JUDGMENT FOR THE EMPLOYER SHOULD HAVE BEEN AFFIRMED.

The case now before the Court is a fitting example of an attack on an employer's business judgment which should not be permitted to prevail. Brieck challenges Harbison-Walker's perception of the requirements of its reduced workforce and the abilities of its employees to fulfill its requirements with his own assertions that he should have been chosen for the single position remaining where four had been before. This attack strikes at the heart of Harbison-Walker's management prerogatives, which the ADEA was not designed to disturb. Moreover, the Third Circuit failed to follow this Court's holding in *Celotex* requiring the non-moving party on a motion for summary judgment to demonstrate a genuine issue of fact for trial, and instead placed the burden on Harbison-Walker to prove the absence of discriminatory intent. Pet. App. at 4a. Therefore, the Third Circuit erred in reversing the lower court's grant of summary judgment.

It is undisputed that Brieck was able to produce the minimal evidence necessary to make out a prima facie case under *McDonnell Douglas*. Brieck was over forty

years of age, was qualified for his own position, and was terminated, and an employee outside the protected class assumed his duties. Pet. App. at 2a.[20] Thus, it fell to Harbison-Walker to articulate a legitimate, nondiscriminatory reason for his termination. *McDonnell Douglas*, 411 U.S. at 804. With its motion for summary judgment, Harbison-Walker included the affidavit of William Sekeras, who as Manager of the Steel Group had made the final decisions on individual layoffs. Pet. App. at 3a. Sekeras explained that Brieck had been terminated as part of a reduction in force caused by business setbacks, and stated that his primary concern in selecting employees for retention or termination, and in particular in selecting one installation specialist out of four to retain, was "the ability of employees to perform the job functions remaining in the reduced business setting." J. App. at 13.

In support of the two decisions at issue, to lay off Brieck in July 1982 and recall Faust in July 1983, Sekeras emphasized the superior contributions which Faust was expected to make to the reduced workforce. Noting that Faust had higher performance evaluations than Brieck, Sekeras enumerated several other reasons, all rooted in Faust's prior experience, that Faust was more valuable to the company, given the type of future business anticipated. J. App. at 14. The company's sales to BOF shops, where Brieck's expertise lay, were extremely low, whereas Faust was the only installation specialist with experience in blast furnace casthouses, a targeted growth market with significant potential for Harbison-Walker. *Id.* Faust also surpassed Brieck in working with records and written reports, customer relations,

[20] It should be noted, however, that the Third Circuit never mentioned whether Brieck should be required to show that he was qualified for the position for which Faust was retained, although plaintiff in his affidavit and brief stated that he could "easily have been trained" to do the work which Faust was already able to do and thus tacitly admitted that he was not immediately qualified for the one remaining position. Pet. App. at 10a (Weis, J., dissenting).

and preparation of bids and quotations, which allowed him to perform functions other than that of an installation specialist. *Id.*

Harbison-Walker having articulated a legitimate reason for selecting Faust over Brieck for retention and recall, the presumption of discrimination raised by Brieck's prima facie case "dropped from the case," and the factual inquiry "proceed[ed] to a new level of specificity," allowing Brieck to demonstrate that Harbison-Walker's reasons were merely a pretext for discrimination. *Burdine*, 450 U.S. at 255. In response, Brieck produced no direct or indirect evidence of age discrimination. Instead, he argued, based on Faust's deposition testimony, that Faust in his new position spent seventy-five percent of his time doing installations, and the remaining twenty-five percent doing reports, which Brieck had also done, doing filing and working on margins.

This evidence, concluded the Third Circuit, was sufficient to raise a jury question as to the credibility of Harbison-Walker's reasons. Pet. App. at 5a. Relying on its prior decision in *Chipollini*, the Third Circuit reversed the district court's grant of summary judgment because "an ADEA plaintiff's evidence need only permit a reasonable inference that the employer's proffered explanation for the discharge is 'unworthy of credence.'" Pet. App. at 2a. While the court did not delve into the type of installations Faust was doing, it thought that the jury should consider whether or not Faust's more varied skills were actually put to use, reasoning that if they were not, the jury might find Harbison-Walker's reason to be pretextual.

In other words, Brieck and the Third Circuit are inviting a jury to second-guess Harbison-Walker's business judgment that its reduced workforce would need less than one full-time installation specialist so that the one person retained would be more valuable if he could perform other work as well. This trespasses into the realm of management prerogative which the ADEA was never

intended to disturb.[21] To defend against Brieck's challenge, based as it is on wisdom gained through hindsight, Harbison-Walker would have had to prognosticate, at the time of the force reduction in 1982, precisely the duties its one remaining installation specialist would be needed to perform later, although its orders for BOF installations were minimal and its hope for work in blast furnace casthouses a mere speculation.

Given Harbison-Walker's uncertain future, it is hardly "unworthy of credence" that the company retained the more versatile employee over one with narrow expertise. To infer discrimination merely because Harbison-Walker may have partially misperceived its future needs goes far beyond *McDonnell Douglas* and *Burdine*.

The Third Circuit's error is even more egregious considering that it failed to apply the *Celotex* standard concerning the moving party's burden on summary judgment. In *Celotex*, this Court unequivocally stated that "we find no express or implied requirement in [Fed. R. Civ. P.] Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." 106 S.Ct. at 2553 (emphasis in original). The court below, however, citing its earlier *Chipollini* decision, stated that "[t]o meet its burden on summary judgment, the defendant employer must show that the plaintiff will be unable to introduce either direct evidence of a purpose to discriminate, or indirect evidence of that purpose by showing that the proffered reason is subject to factual dispute." Pet. App. at 4a. Without question, this conclusion forces the employer to prove "absence of discriminatory motive" in direct contravention of this Court's decision in *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978).

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[21] *See, e.g., Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Parcinski v. The Outlet Company*, 673 F.2d 34 (2d Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983); *Jorgensen v. Modern Woodmen of America*, 761 F.2d 502 (1985).

As stated above, nearly every plaintiff will be able to develop post hoc theories of why the employer's business decision may have been unwise. To deny summary judgment absent any direct or indirect evidence of age discrimination merely because the employer's "credibility" is challenged on that basis, and because the employer cannot prove absence of a discriminatory motive, will foreclose summary judgment in favor of the employer in every discrimination case.

CONCLUSION

For the reasons stated, EEAC respectfully submits that the decision of the Third Circuit Court of Appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1987

HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC.,
Petitioner,

v.

EUGENE F. BRIECK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

Amicus Curiae files this Brief in support of Petitioner pursuant to Rule 36 of the Rules of the Supreme Court of the United States. The written consents of Petitioner and Respondent have been filed with the Court.

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of The United States ("Chamber") is a nonprofit corporation organized and existing under the laws of the District of Columbia. The Chamber is the largest federation of business, trade and professional organizations in the United States. The Chamber has over 180,000 corporate, partnership and proprietorship members, as well as state and local chambers of commerce and trade associations. The Chamber's members employ approximately 22,817,000 persons.

The Chamber regularly represents its members in important employment and labor relations matters, such as this case, before the United States Courts, the United States Congress and the Executive Branch and regulatory agencies of the United States.

The Chamber's members have a significant interest in the question presented in this case. This Court has been asked to determine whether Respondent, who alleges intentional employment discrimination, properly avoided summary judgment merely by questioning Petitioner's business judgment, without presenting any evidence, direct or indirect, that Petitioner's judgment was in fact motivated by an intent to discriminate. This question arises from the standard for resolving summary judgment motions in employment discrimination cases which has been adopted by the United States Court of Appeals for the Third Circuit. In its *in banc* decision in *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir.), *cert. dismissed*, 108 S. Ct. 26 (1987), and in this case, the Third Circuit reversed summary judgments entered for employers and held that a plaintiff in an employment discrimination case may avoid summary judgment by merely casting doubt on the credibility of the employer's articulated reasons for the

employment action, regardless of whether or not the plaintiff presented *any* evidence of discrimination. This standard is not only contrary to this Court's precedent but also severely restricts the power of trial courts to decide cases before trial.

Indeed, the Third Circuit has virtually eliminated the possibility of summary judgment in employment discrimination cases, which continue to crowd the federal courts' already overburdened dockets. This results in a significant restriction of the available options Chamber members have in defending such cases, and in an escalation of the already high costs of litigation as more of these cases proceed to expensive and time-consuming trials. If this Court adopts the Third Circuit's standard for resolving employment discrimination summary judgment motions, the federal courts will become, whenever an employee attacks an employment decision, nothing more than second guessers of Chamber members' routine business judgments. This, of course, is not the role of the federal courts. Therefore, the Chamber submits that it is vital to its members' inherent managerial prerogatives, and to the management of federal court dockets, that this Court reject the Third Circuit's standard for resolving summary judgment motions in employment discrimination cases.

SUMMARY OF ARGUMENT

The Third Circuit's standard for resolving employment discrimination summary judgment motions directly conflicts with this Court's general teachings regarding summary judgment. Under the Third Circuit's standard, a plaintiff can avoid summary judgment, can proceed to trial, and can ultimately prevail, without ever establishing a causal nexus between the adverse employment action

and any statutorily-forbidden criterion. This standard has not only virtually eliminated summary judgment in employment discrimination cases in the Third Circuit but also, as a practical matter, severely and unfairly hinders the defense of such actions.

The Third Circuit's standard also conflicts with this Court's rulings on the proper allocation of the burden of proof in employment discrimination cases. Unless this Court rejects the Third Circuit's flawed approach to summary judgment, plaintiffs will be able to proceed to trial with cases that should have been disposed of on summary judgment as factually unsupportable. Congress never intended that the federal anti-discrimination statutes should become vehicles for second-guessing an employer's routine business and employment decisions, and this Court should not place its imprimatur on such an unsanctioned result.

ARGUMENT

THE THIRD CIRCUIT'S SUMMARY JUDGMENT STANDARD IN EMPLOYMENT DISCRIMINATION CASES SHOULD BE REVERSED AS A MATTER OF LAW AND POLICY

The Third Circuit Has Ignored This Court's Instruction That Summary Judgment Is An Important Part Of Federal Procedure Intended To Dispose Of Unsubstantiated Claims Prior To Trial And, Instead, Has Virtually Eliminated Summary Judgment In Employment Discrimination Cases.

This Court's 1986 trilogy of summary judgment cases soundly reaffirms, and indeed mandates, the vitality and

effectiveness of summary judgment as the proper and efficient way of eliminating unfounded claims without the time and expense a trial requires. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574 (1986). These decisions serve as a well-needed tocsin that federal courts can and should dispose of unmeritorious claims before trial.[1]

In *Celotex Corp.*, this Court unequivocally stressed the important role served by summary judgment in the overall scheme of the Federal Rules of Civil Procedure:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action."

477 U.S. at 327.

Further, in *Celotex Corp.* this Court admonished the lower courts that, under Rule 56, they must be cognizant of the rights of persons opposing factually unsupportable claims or defenses to have such claims or defenses disposed of prior to trial:

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[1]Federal courts, and particularly the Third Circuit (both historically and recently), have not always embraced the summary judgment procedure. *See* Schwarzer, *Summary Judgment under The Federal Rules: Defining Genuine Issues of Fact*, 99 F.R.D. 465, 466-67 (1984) ("Discussions of summary judgment [by the federal courts] generally consist of formalistic rhetoric and often reflect a hostility toward summary procedures [and] an inclination toward sparing application of the rule .... This is a regrettable state of affairs, frustrating the intent of those who drafted Rule 56 and of the Supreme Court and Congress which adopted it to further the efficient and economical resolution of issues not requiring ... trial.")

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex, 477 U.S. at 327.

Because the flood tide of employment discrimination cases continues in the federal courts, the role of summary judgment in promoting the just, speedy and inexpensive determination of cases demands even greater emphasis. As of June 30, 1987, approximately 10,500 private employment-related civil rights cases were pending in the federal courts.[2] During the 12 months preceding that date, nearly 9,000 additional employment-related civil rights cases were filed in the federal district courts.[3] Even more striking is the fact that a greater percentage of employment-related civil rights cases go to trial than any other category of federal question and diversity cases.[4]

[2]Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts (1987), Table S-12 (at 116).

[3]*Id.*, Table C-2 (at 178).

[4]*Id.*, Table C-4 (at 209). The statistical data establishes that on a national level 14.3% of the employment-related civil rights cases reached trial in the 12 month period ending June 30, 1987, while only 8.0% of diversity cases reached trial, and only 5.6% of all federal question cases reached trial, during that same period. Table C-4 (at 209, 210). Further, the vast majority of [illegible] trials in employment-related civil rights cases, which are available, for example, under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, lasted from between 4 to 9 days. Table C-8 (at 226).

Therefore, in light of *Celotex Corp., Anderson, and Matsushita*, and in light of the already large federal court case load, the use of the summary judgment procedure should be heartily endorsed by the courts of appeals. Indeed, most have done just that. But the Third Circuit's standard in employment discrimination cases, because it permits plaintiffs to go to trial without adducing any evidence of discrimination, completely eviscerates Rule 56 and makes summary judgment for defendants a chimera.

As aptly stated by the United States District Court for the Western District of Pennsylvania in *Treese v. Chevron Corp.*, 666 F. Supp. 76 (W.D. Pa. 1987), *aff'd w/o op.*, No. 87-3608, 1988 U.S. App. LEXIS 5196 (3d Cir. March 24, 1988), "Defendant attempts what is now nearly impossible—summary judgment in an age discrimination case."[5] Similarly, as noted by one commentator:

> The [Third Circuit] court of appeals' reputation for summary judgment is not soft either. The court has been roundly criticized by trial judges and litigators because it scours the record to find a scintilla of evidence raising a factual issue. Chief Judge John P. Fullam of the Eastern District of Pennsylvania joked that

[5]In *Treese*, plaintiff filed an ADEA action alleging that his discharge was based upon his age. 666 F. Supp. at 76. Defendant moved for summary judgment contending that plaintiff's suit should be dismissed because it was filed beyond the two year limitations period for ADEA claims, and because plaintiff presented no evidence of "willfulness" which would have entitled him to the ADEA's three year limitations period. *Id.* at 76-77. The district court agreed holding that plaintiff could not satisfy even the "minimum quantum" of evidence under the heightened evidentiary standard for finding a willful violation of the ADEA. *Id.* at 77. The district court, however, further remarked that plaintiff likely would have avoided summary judgment based upon the evidence he presented "in light of *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987), if this case had been filed within two years of plaintiff's discharge." 666 F. Supp. at 77.

> the court of appeals "can find an issue of fact under a rock."

Weakland, *Life In The 3rd Circuit*, The Pennsylvania Lawyer 6, 8 (Oct. 1987).[6]

The Third Circuit's *in banc* decision in *Chipollini* and its progeny clearly illustrate the Third Circuit's microscopic search for a fact issue and its misapplication of this Court's precedent. In fact, in *Chipollini, Sorba v. Pennsylvania Drilling Co.*, 821 F.2d 200 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 730 (1988), and the instant case, the Third Circuit reversed summary judgments on the basis that, to avoid summary judgment and thereby proceed to trial, a plaintiff must only cast doubt on an employer's articulated reasons for the attacked employment action, without adducing any direct or indirect evidence of discrimination.[7]

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[6]Unlike several other courts of appeals, there appears to be a lack of published empirical data regarding the Third Circuit's rate of reversal or affirmance of summary judgments. *See, e.g., Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1570 (1987), where in light of *Celotex and Anderson*, the Second Circuit went to great lengths to point out to the bar that a recent study had confirmed a high affirmance rate by the Second Circuit in summary judgment cases; Schwarzer, *supra* at 467 n 9 (data on Ninth Circuit); Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 Geo. L. J. 1065, 1113 n. 347 (April 1986) (listing various studies regarding summary judgment reversal and affirmance rates in courts of appeals and district courts). In his article on the Third Circuit, Weakland states that most civil case reversals in the Third Circuit in 1986 involved summary judgment or Rule 12 dismissals. Weakland, *supra*, at 7. According to Weakland, of the 133 published reversals in civil cases in the Third Circuit in 1986, 79 dealt with either summary judgment or Rule 12 dismissals. *Id.*

[7]The Third Circuit has also utilized this same analysis in reversing judgment notwithstanding the verdict for an employer in an ADEA action. *See Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258 (3d Cir.

(Continued on next page)

In *Chipollini*, the plaintiff presented no evidence of age discrimination—he merely asserted that the defendant's proffered reasons for his termination from employment were untrue. 814 F.2d at 899-901; *see also* 814 F.2d at 904 (Hunter, J. dissenting). The Third Circuit held that this assertion was sufficient to avoid summary judgment because "the issue of pretext turns on Spencer's [the employer's] credibility . . . ." 814 F.2d at 901. According to the Third Circuit, "a plaintiff can prevail by means of indirect proof that the employer's reasons are pretextual without presenting evidence specifically relating to age." *Id.* at 898. The Third Circuit held that the proper analysis is as follows:

> the [district] court should have considered whether evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge reasonably *could* support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence *necessarily* leads to that conclusion that the employer did act for discriminatory reasons.

814 F.2d at 900 (emphasis in original), citing *Graham v. F. B. Leopold Co.*, 779 F.2d 170, 172-73 (3d Cir. 1985).[8]

(Continued)

1987). For application of this analysis to other discrimination claims resulting in a reversal of summary judgment, *see Jackson v. University of Pittsburgh*, 826 F.2d 230 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 732 (1988) (race).

[8]The *Graham* decision started the Third Circuit down the road to the inevitable review by this Court of its flawed summary judgment standard. There, plaintiff, who had been terminated as a result of a corporate reduction in force, brought an ADEA action challenging his termination. The Third Circuit reversed the district court's entry of summary judgment for the defendant. In *Graham*, as in *Chipollini*, there was insufficient evidence to create a genuine issue of fact regarding whether the employer's articulated reason was really a pretext for age

(Continued on next page)

Thus, the Third Circuit acknowledged in *Chipollini* that it has, in effect, removed the requirement that a plaintiff prove that he or she was discriminated against because of age.

Similarly, in *Sorba*, also an ADEA action, the Third Circuit reversed the district court's entry of summary judgment for the employer on the basis of plaintiff's assertion that his employer's articulated reason for his discharge, *i.e.*, poor job performance, was unfounded. 821 F.2d at 203-205. Relying upon *Chipollini*, the Third Circuit held that:

> The district court's error in this case is the same as that of the district court in *Chipollini*. To defeat a summary judgment motion based only on a defendant's proffer of a nondiscriminatory animus, a plaintiff who has made a *prima facie* showing of discrimination, need only point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence.
>
> In this case, Sorba's trial burden will be to show that it is more likely than not that the employer did *not* discharge him because of the poor results on his last three

(Continued)
discrimination. In dissent, Judge Adams criticized the majority for its overreaching, which he believed was designed to create a "factual dispute":

> I merely state that, in my view, the record presented here does not reasonably support an inference that the decision to terminate Graham was caused by anything but economically motivated efforts at reorganization. If courts strain to find snippets of evidence to support highly questionable inferences of discriminatory conduct they not only will unduly hobble necessary restructuring by hard-pressed industries, but eventually cause Congress to reconsider the controlling legislation.

779 F.2d at 175.

> jobs. Therefore, to defeat a summary judgment motion, the evidence need only establish a reasonable inference that the employer did not dismiss Sorba because of his poor performance.

821 F.2d at 205 (emphasis in original; footnote omitted). As in *Chipollini*, plaintiff presented no evidence which directly or indirectly related to age discrimination.

In the instant case, like *Chipollini and Sorba*, the Third Circuit reversed the district court's entry of summary judgment for Petitioner without any showing that any dispute of material fact existed which would demonstrate that Petitioner's articulated reasons for Respondent's lay-off were a pretext for age discrimination. *See* Pet. App. 10a-11a (Weis, J. dissenting). Here, Respondent was laid-off pursuant to a reduction in force while Petitioner retained a younger employee because of his more diverse skills and broader experience. *Id.* at 3a. In opposing summary judgment below, Respondent did not challenge Petitioner's claim that the younger employee had the more diverse background; instead, he questioned only Petitioner's business judgment that such diverse experience was utilized enough to justify the younger employee's retention. *Id.* at 5a. The Third Circuit held that this, without any more, was enough to avoid summary judgment and proceed to trial.

Simply put, the Third Circuit's summary judgment standard, as set forth in *Chipollini, Sorba* and this case, cannot be reconciled with this Court's mandate that the ultimate issue in a discrimination case is whether the employer engaged in intentional discrimination. *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792,

805 (1973); *see also,* Milone, *Age Discrimination: Proving Pretext Under The ADEA,* 13 Empl. Rel. L.J. 104, 108 (1987). This burden of persuasion remains at all times with the plaintiff. *Burdine,* 450 U.S. at 253. The defendant is not required to prove, at any stage, the absence of a discriminatory motive. *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24, 25 (1978) (per curiam). Yet, by permitting a plaintiff to defeat a summary judgment motion and even, ultimately, prevail at trial without presenting any evidence of discrimination, the Third Circuit has impermissibly shifted the burden of persuasion from plaintiff to defendant. *See Chipollini,* 814 F.2d at 902-904 (Hunter, J. dissenting).[9] Accordingly, the Third Circuit's decision in *Chipollini* and its progeny, including the instant case, represent a fundamental departure from the *McDonnell Douglas/Burdine* analysis which this Court should not permit.

As noted, the Third Circuit's standard virtually eliminates summary judgment in employment cases. This not only severely hinders the defense of such actions by unfairly restricting the employer's available options and

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[9]The Fifth Circuit, in *Elliot v. Group Medical & Surgical Serv.,* 714 F.2d 556 (5th Cir. 1983), *cert. denied,* 467 U.S. 1215 (1984), explicitly rejected such a shifting of the burden of persuasion and reversed a jury verdict in favor of a group of employees who had been terminated in connection with a corporate reorganization:

> *McDonnell-Douglas* is not a vehicle that permits a plaintiff to cast the burden of persuasion on the defendant and compel him to prove that his actions were nondiscriminatory. Nor is it a device which permits the jury to examine an employer's reasons for discharge and determine that the employer's business judgment or policies do not appeal to its sensibility. The inquiry is whether the plaintiff has been discriminated against because of his age; the ADEA proscribes no other conduct.

714 F.2d at 566-67 (citation omitted).

litigation strategy, but also serves to increase the likelihood that factually unsupportable and even frivolous cases will reach trial. A disgruntled employee can, and generally does, easily question, through self-serving affidavits, his or her employer's proffered reasons or business judgment for an adverse employment decision. There can be no doubt that, if this Court does not reject the Third Circuit's flawed analysis, the result will be far more trials, far higher settlement costs and far higher defense costs. Certainly plaintiffs, even (perhaps, particularly) in dubious cases, will perceive their positions to be stronger than ever. Such a situation will completely undermine the clear purpose of Rule 56 to dispose of, efficiently and effectively, claims which are based upon speculation.

Indeed, the Third Circuit's summary judgment standard is also antithetical to the standard several other courts of appeals have applied when resolving such motions under the *McDonnell Douglas/Burdine* analysis. These courts recognize that summary judgment occupies just as important a role in employment discrimination cases as in any other type of case. The fact that employment discrimination cases involve questions of motivation or intent has no bearing on the availability of summary judgment. *Anderson,* 477 U.S. at 256-57. As stated by the Second Circuit in *Meiri v. Dacon,* 759 F.2d 989, 998 (2d Cir.), *cert. denied,* 474 U.S. 829 (1985):

> The summary judgment rule would be rendered sterile, however, if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion. Indeed, the salutary purposes

of summary judgment—avoiding protracted, expensive and harassing trials—apply no less to discrimination cases than to commercial or other areas of litigation.

As we have stated, "[a] party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial for in doing so he risks the possibility that there will be no trial." . . .

To allow a party to defeat a motion for summary judgment by offering purely conclusory allegations of discrimination, absent any concrete particulars, would necessitate a trial in all Title VII cases. Given the ease with which these suits may be brought and the energy and expense required to defend such actions, we believe the trial judge properly granted summary judgment.

759 F.2d at 998 (citations omitted).

So also, in *Dea v. Look*, 810 F.2d 12 (1st Cir. 1987), the First Circuit affirmed summary judgment for the employer, despite the plaintiff's attempts to discredit the employer's articulated reason for the discharge. The court noted that the plaintiff's challenge to the employer's stated justification "merely provide[s] another reason, totally unrelated to age, for his discharge." *Id.* at 15. The First Circuit held that:

> evidence contesting the factual underpinnings of the reason for the discharge proffered by the employer is insufficient, without more, to present a jury question. Plaintiff continues to carry the burden of showing discriminatory intent, and . . . [he] cannot meet his burden of proving "pretext" simply by refuting or questioning the defendants' articulated reason.

Id.; see also White v. Vathally, 732 F.2d 1037, 1043 (1st Cir.) ("[m]erely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent . . . ."), *cert. denied*, 469 U.S. 933 (1984).

Similarly, the Seventh Circuit in *Dale v. Chicago Tribune Co.*, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987), affirmed summary judgment for an employer which had proffered a nondiscriminatory explanation for a discharge. The Seventh Circuit held that a plaintiff "must establish a nexus" between the evidence which purported to show that the employer's explanation was unworthy of credence and age discrimination. *Id.* at 465. Because the plaintiff's evidence in *Dale* did not relate to age, and consisted principally of "self-interested assertions" which challenged the prudent business judgment of his supervisors, summary judgment was held to be appropriate. *Id.* at 464-65. Unlike the Third Circuit, the Seventh Circuit properly refused to allow plaintiff's assertions that his performance was adequate, without more, to defeat summary judgment.[10]

Likewise, in *Slaughter v. Allstate Ins. Co.*, 803 F.2d 857 (5th Cir. 1986), the Fifth Circuit affirmed the district court's entry of summary judgment for the employer.

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[10]The Seventh Circuit also aptly noted that it "does not sit as a super-personnel department that reexamines an entity's business decisions." 797 F.2d at 464; *see also Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559 (7th Cir.) (in employment discrimination case the Seventh Circuit reversed verdict for employee where district court had not concluded that employee had established that employer's reasons for discharge were a "pretext for discrimination" but, instead, had merely concluded that employer had insufficient cause to fire employee; plaintiff is required to "show not only a false reason but also a causal chain in which race or another forbidden criterion plays a dispositive role"), *cert. denied*, 108 S. Ct. 488 (1987).

There, plaintiff, an insurance agent, was discharged for submitting a false insurance claim for damages to his home. 803 F.2d at 858-59. He was then replaced by a younger employee. *Id.* Plaintiff brought suit asserting, *inter alia*, an ADEA claim. The Fifth Circuit, recognizing the impact of *Celotex* and *Anderson*, properly concluded that plaintiff had failed to produce any evidence establishing that the articulated reason for his discharge was a pretext for age discrimination. 803 F.2d at 860-61. The Fifth Circuit determined that, although plaintiff testified in his deposition that he believed that his employer had a policy of replacing employees over age 40 with younger agents to reduce expenses, he adduced no evidence of such a policy and "[t]estimony based on conjecture alone is insufficient . . . ." 803 F.2d at 860; *see also Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 596-97 (11th Cir. 1987) (summary judgment in age and sex discrimination case affirmed; plaintiff's "conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination . . . .")

In stark contrast to these holdings of other courts of appeals, a plaintiff in the Third Circuit can avoid summary judgment, can plead his case to the jury, and can ultimately prevail without ever providing any direct or indirect evidence of a causal nexus between the adverse employment action and a statutorily prohibited reason, for example, as here, age. This is hardly the kind of situation that Congress envisioned when it enacted Title VII and ADEA to remedy only certain narrowly-defined types of employment decisions—ones which are based upon discriminatory reasons.

The federal anti-discrimination statutes were never intended to provide a forum for disgruntled employees to

air their complaints. They do not impose (and were never designed to impose) upon employers the burden of establishing a just or proper cause for their personnel decisions. Yet, this is exactly the result which occurs under the Third Circuit's standard. Accordingly, it is imperative that this Court reemphasize that *McDonnell Douglas* and *Burdine* require not only proof that plaintiff suffered an adverse employment action, but also that this adverse employment action happened to plaintiff because of his or her race, age, sex or some other statutorily-prohibited reason. Without this logical nexus between the adverse employment action and a statutorily-prohibited reason, the *McDonnell Douglas/ Burdine* analysis becomes nothing more than a hollow shell. In such a situation, an employer likely will face ever increasing liability merely because a jury or judge may disagree with its reasons for an employment decision.

The Third Circuit itself seems to recognize that its new standard results in giving the anti-discrimination laws an effect never contemplated by Congress. In *Chipollini*, the Third Circuit offered this advice to employers: "A defendant which is less than honest in proffering its reason for discharge risks an unnecessary age discrimination verdict." 814 F.2d at 899. Thus, the Third Circuit has admitted that it has turned the federal anti-discrimination statutes into codes of good faith and fair dealing. In other words, the Third Circuit's standard has changed these laws from ones designed to prevent discrimination into laws which punish employers for not being brutally frank with their employees.

The Third Circuit completely ignores the fact that an employer's articulated reason for terminating an employee may be "pretextual" without violating the ADEA or any other civil rights statute. *See Goldberg v. B. Green & Co.*,

836 F.2d 845, 849 (4th Cir. 1988). An employer motivated by unpublicized financial problems, a desire to spare the feelings of a loyal or long-term employee or even nepotism may provide an employee with an explanation which is not entirely accurate, although well-intentioned. *See, e.g., Askin v. Firestone Tire & Rubber Co.*, 600 F. Supp. 751, 755 (E.D. Ky. 1985), *aff'd w/o op.*, 785 F.2d 307 (6th Cir. 1986); *Chipollini*, 814 F.2d at 903 (Hunter, J. dissenting). In such circumstances, the employer has committed no illegal act under any statute, yet the Third Circuit permits a jury to hold otherwise.

Unless this Court rejects the Third Circuit's standard for resolving summary judgment motions in employment discrimination cases, plaintiffs will be encouraged more than ever to file suspect or dubious discrimination claims which will likely reach trial. Such a situation is inherently unfair to employers who often must make hard employment decisions based upon economic realities, and unduly increases the workload of an already overburdened federal court system.

CONCLUSION

For all of the foregoing reasons, Amicus Curiae respectfully urges this Court to reverse the decision of the Third Circuit in this case and reject the Third Circuit's standard for resolving employment discrimination summary judgment motions.

Respectfully submitted,

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No. 87-271

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

HARBISON-WALKER REFRACTORIES
A DIVISION OF DRESSER INDUSTRIES, INC.,
Petitioner

v.

EUGENE F. BRIECK,
Respondent

On Writ Of Certiorari To
The United States Court Of
Appeals For The Third Circuit

AMICUS CURIAE BRIEF OF PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION (PELA) IN SUPPORT OF RESPONDENT

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EUGENE F. BRIECK
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AMICUS CURIAE BRIEF OF PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

The Plaintiff Lawyers Employment Association (PELA) respectfully submits this brief Amicus Curiae in support of Respondent. The written consents of all parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

Amicus Plaintiff Employment Lawyers Association (PELA) is a non-profit organization consisting of over 630 lawyers in 48 states who specialize in representing individual employees concerning employment and labor matters. Most of PELA members' clients are non union employees with claims of wrongful or discriminatory termination in violation of state or federal law. Many PELA members represent individuals with claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq.

PELA is deeply concerned that victims of age discrimination continue to receive the same benefits of the inference of discrimination established by a prima facie case as victims of race or sex discrimination under Title VII of the Civil Rights Act, 42 U.S.C. 2000 et seq. Thus, PELA urges affirmance of the Third Circuit decision that summary judgment is improper where an

inference of discrimination exists and the employer's explanation for its actions is subject to credibility determinations.

SUMMARY OF ARGUMENT

Plaintiff Brieck, a qualified older employee, was replaced by a substantially younger employee, Mr. Faust. Plaintiff established a prima facie case, entitling him to a presumption of discrimination. The Defendant's proffered explanation was suspect because the stated need for an employee with "versatility" was refuted by contradictory evidence.

The Third Circuit correctly held that evidence of "inconsistent" and "implausible" reasoning raises issues of fact and issues of credibility that cannot be resolved on summary judgment. The motive and intent of the various defense witnesses and the credibility of their testimony is critical. If the

employer's proffered defense is disbelieved, prima facie case evidence is sufficient to support a plaintiff's jury verdict.

Amicus supports the Third Circuit decision holding that victims of age discrimination can utilize the same rules of circumstantial proof established in the lead Title VII cases of Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). As applied to ADEA cases, a McDonnell Douglas presumption of discrimination is established where an employee 40 or over is terminated and replaced by a younger person. Once the employer introduces evidence that the termination was not discriminatory, the presumption is rebutted. But, the inference of discrimination raised by the the prima facie elements remains. Also, where no credible legitimate reason exists for the

employer's actions, an inference of discrimination arises "indirectly" from the lack of legitimate explanation. Thus, the ADEA plaintiff may prevail by showing that the defendant's evidence is "unworthy of credence" and is a mere pretext for discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Employers often believe it is "good business" to retain younger employees rather than older employees in reduction in force cases. Fears of high insurance costs, a belief that older workers are inflexible, and a desire for cheaper labor costs have stimulated management to "tighten the belt" by laying off older employees. Moreover, as employers become more sophisticated, discrimination is becoming increasingly hard to prove. Fortunately, the prima facie case standard enables a plaintiff to prevail in spite of these obstacles.

Defendant wants to make a new rule, making it far easier to enter a judgment for employers. Defendant wants to prevent a plaintiff, who asserts that the employer's alleged justification for termination is a sham, from attacking the credibility of defense witnesses. If Defendant prevails, employers who manufacture false reasons for firing older employees can escape the effect of the well settled law that an inference of discrimination is raised by proof of McDonnell-Douglas prima facie elements.

STATEMENT OF THE CASE

Plaintiff-Respondent Brieck was 55 years old. He was a well qualified senior installation specialist with seventeen years of service. Petitioner-Defendant Harbison-Walker Refractories, because of an alleged need to reduce its workforce, laid off Plaintiff Brieck and several others with similar jobs. Thereafter, Defendant recalled Mr. Faust, then age 39, but did not recall Mr. Brieck. Under these facts, Plaintiff established a prima facie case of age bias under McDonnell Douglas v. Green, 411 U.S. 792 (1973).

Defendant said it rejected Brieck because the younger Faust had more diverse skills and was more qualified to do non-installation work. Plaintiff argued that the Company's stated reasons for selection were false and "unworthy of credence." Plaintiff produced evidence showing Defendant's "versatility" explanation was indeed a sham. For example, after his recall, Faust spent 75% of his time doing installations. The remaining time was spent on other activities which Plaintiff could have performed.

The District Court held that the "wisdom" of the Company's alleged judgment as to which employee should be retained could not be challenged. The Third Circuit reversed, holding that evidence of Faust's post recall

assignments raised a "question of fact as to whether the employer really believed that Faust's "varied" experience made him more qualified than Brieck..." (emphasis added). Relying upon Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1983), the Third Circuit had previously held that an ADEA plaintiff could defeat a motion for summary judgment by showing that the employer's proffered reason for the Plaintiff's dismissal was not "worthy of credence." Chipollini v. Spencer Gifts, 814 F.2d 893, 900 (3d Cir. 1987) (en banc). The Court also ruled that "evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge could support an inference that the employer did not act for non-discriminatory reasons, and must be considered in an ADEA action." Id. at 900 (emphasis in original).

Defendant seeks to strip ADEA plaintiffs of their major weapon in the legal war against age discrimination. For a quarter of a century, the courts have recognized the grave difficulties of proving discrimination. Now Defendant, in the guise of protecting "management rights," seeks to destroy the "prima facie plus pretext" inference of discrimination arising when a qualified and experienced older employee is fired and replaced by a far younger and less senior employee and the proffered reason for his termination is "unworthy of credence."

ARGUMENT

I. A PRIMA FACIE CASE RAISES AN INFERENCE OF DISCRIMINATION THAT REMAINS AS EVIDENCE TO BE CONSIDERED BY THE JURY

A) Establishment Of A Prima Facie Case

An ADEA plaintiff may establish age discrimination by a variety of methods. A prima facie[1] case may be established by

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[1] A "prima facie case" is variously defined in Black's Law Dictionary as:

Such as will suffice until

demonstrating that the plaintiff was: 1) a member of the protected class; 2) discharged; 3) qualified for the position; and 4) replaced by a younger person. McDonnell Douglas v. Green, 411 U.S. 792 (1973). Proof of these elements raises a presumption of discrimination.[2]

> contradicted and overcome by other evidence.
>
> A case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded.
>
> A litigating party is said to have a prima facie case when the evidence in his favor is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side. In some cases the only question to be considered is whether there is a prima facie case or no. (citations omitted).

Id., 4th Ed. 1968 pp. 1353-1354

[2] There are other methods of establishing a prima facie case. Disparate treatment, statistics, and pattern and practice evidence are examples.

B. The Effect of the McDonnell Douglas Prima Facie Presumption of Age Discrimination

When a plaintiff establishes a prima facie case of age discrimination, at that point there is both a rebuttable presumption of discrimination and an inference of discriminatory treatment. Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 874-875 (1984); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1983); Fed. R. Evid. 301; see Conf. Rept. Np. 93-1277 to accompany H.R. 5463, pp. 9-10 . This Court has explained the effect of establishing a McDonnell Douglas prima facie presumption as "simply proof of actions taken by the employer from which we inferred discriminatory animus that in the absence of any other explanation it is more likely than

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> There is no requirement of direct evidence of discriminatory intent. Indirect or circumstantial evidence will suffice. United States Postal Service v. Aikens, 460 U.S. at 714 n.3, Furnco Construction Corp. v. Waters, 438 U.S. 567, 579-580 (1978).

not that those actions were based on impermissible considerations." Furnco, 438 U.S. at 579-580.

Once the prima facie case is established, the burden of production of evidence then shifts to the defendant to show that its actions were not discriminatory. Aikens, 460 U.S. at 714-715. If the defendant employer meets that burden of production, the prima facie presumption is rebutted, but the inference of discrimination remains as evidence in the case. The trier of fact may still consider, in making its ultimate findings of fact, the evidence introduced by the plaintiff to establish the prima facie presumption of age discrimination. Burdine, 450 U.S. at 255 n.10.

C. Under Rule 301 of the Federal Rules of Evidence An Inference of Discrimination Remains Even After A Presumption Is Rebutted

Rule 301 of the Federal Rules of Evidence specifically provides that even where a presumption of discrimination is rebutted,

the inference created by meeting the requirements for establishing the presumption remains for the trier of fact to consider in making the ultimate determination of whether discrimination occurred. See Burdine, 450 U.S. at 255 n.10; Cooper, 467 U.S. at 875; Henry v. Lenox Industries, Inc., 768 F.2d 746, 750-751 (6th Cir. 1985); Fed. R. Evid. 301.

To interpret Burdine in the manner Defendant urges, that a McDonnell Douglas prima facie presumption of age discrimination, once rebutted, disappears from the case and does not remain as a permissible inference of discrimination, would be completely inconsistent with Rule 301 of the Federal Rules of Evidence. As stated by the House and Senate Conference Committee in the legislative history that accompanied Rule 301:

> The House bill provides that a presumption in civil actions and proceedings shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut it. Even though evidence contradicting the presumption is offered, a

presumption is considered sufficient evidence of the presumed fact to be considered by the jury. The Senate amendment provides that a presumption shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut the presumption, but it does not shift to that party the burden of persuasion on the existence of the presumed fact.

Under the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may presume the existence of the presumed fact from proof of the basic fact. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic fact.

The Conference adopted the Senate amendment.

Conf. Rept. No. 93-1597 to accompany H.R. 5463

P.L. 93-595, pp. 5-6 .

Contrary to Rule 301 of the Federal Rules of Evidence and Burdine, supra, Defendant would have this court rule that the inference of discrimination created by proof of the McDonnell Douglas criteria disappears from the case whenever the employer produces any evidence in rebuttal. Defendant urges, therefore, that an ADEA plaintiff must then produce additional evidence of age bias in order to avoid summary judgment.

However, this Court recognized in Burdine that even where the defendant employer presents evidence tending to discredit plaintiff's prima facie evidence or offers evidence in support of its contention that the plaintiff's termination was not discriminatory, that does not necessarily require that the plaintiff produce additional evidence in support of his claims. "[T]here may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant's

witnesses, will suffice to discredit the defendant's explanation." Burdine, 450 U.S. at 255 n.10.

Defendant urges upon this Court a "bursting bubble" theory regarding the effect of the McDonnell Douglas presumption. Defendant's contention is flatly contradictory to Rule 301 of the Federal Rules of Evidence and applicable law. An inference of discrimination, created pursuant to the McDonnell Douglas criteria as applied in ADEA cases, suffices, in combination with the other facts in this case, to create a question of fact that makes erroneous summary judgment in Defendant's favor.

II. The Third Circuit Decision Is Consistent With Prior Decisions of This Court That An Inference of Discrimination May Arise Indirectly From Defendant's Pretextual Explanation For A Discriminatory Discharge

In Furnco Construction Corp. v. Waters, the Court held:

> ...we know from our experience that people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons have been eliminated...it is more likely than not that the employer based his decision on an impermissible consideration...

Id., 438 U.S. at 577. Thus an inference of discrimination may be drawn by the jury where the plaintiff shows that the defendant's reasons for its actions are totally arbitrary and without a legitimate basis.

In Texas Department of Community Affairs vs. Burdine, 450 U.S. 248 (1981) this Court also held that a successful Title VII plaintiff:

> must demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. (emphasis supplied)

Id. at 256. This Burdine "unworthy of credence" standard permits a plaintiff, who has shown only a prima facie case, to prevail, without any additional evidence, by showing the defendant's explanation is false and pretextual.

The Burdine rule has been routinely applied in age bias cases. As stated by the Seventh Circuit:

> [A]n employer who knowingly discriminates on the basis of age may leave no written records revealing the forbidden motive. When evidence is in existence, it is likely to be under the control of the employer, and the plaintiff may not succeed in turning it up. The indirect method compensates for these evidentiary difficulties by permitting the plaintiff to prove his case by eliminating all lawful motivations instead of proving directly an unlawful motivation. (emphasis supplied)

LaMontague v. American Convenience Products Inc., 750 F.2d 1405, 1410 (7th Cir. 1984).

> If the employer is trying to hide its real reason, that effort - coupled with the evidence making up the employee's prima facie case - may convince the trier of fact that the real reason needed to be hidden and therefore probably was discriminatory.

Pollard v. REA Magnet Wire Co., 824 F.2d 557, 559 (7th Cir.), cert. denied 108 S.Ct. 488 (1987).

Victims of age discrimination deserve the evidentiary effect of the inference of discrimination raised pursuant to the indirect, "unworthy of credence" standard. Older employees generally have more skills and ability than younger employees because of their experience. Seniority systems which favor older workers have been accepted by American business for the past half century as fair. Thus, the selection of a younger employee ordinarily suggests a presumption of bias that is even greater than selection of a man instead of a woman or a white instead of a black. Here, there was powerful evidence of a false explanation, which in conjunction with the McDonnell Douglas prima facie case elements, raises an inference of discrimination.

III. The Third Circuit Decision Is Consistent With The Decisions Of The Other Circuits That Have Permitted ADEA Plaintiffs To Survive Summary Judgment By Showing That The Employer's Stated Business Reason Is Unworthy of Credence

The majority of the Circuits follow the Burdine approach in ADEA cases, holding that where a plaintiff discredits the defense by showing that the explanation is "unworthy of credence," the prima facie case presents sufficient evidence to submit the case to the jury. Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3d Cir. 1987); Crimm v. Missouri Pacific Railway, 750 F.2d 703 (8th Cir. 1984); LaMontagne v. American Convenience Products, Inc., 750 F.2d 1405 (7th Cir. 1984); Krodel v. Young, 748 F.2d 701 (D.C. Cir. 1984); Geller v. Markham, 635 F.2d 1027 (2nd Cir. 1980); and Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980). As the Fifth Circuit stated in Thornbrough v. Columbus. & Greenville Railway, 760 F.2d 633 (5th 1985):

> Thus in our view, unlike Humpty-Dumpty, the employee's prima facie case can be put back together again, through

> proof that the employer's proffered reasons are pretextual. (emphasis supplied).

Id. at 640.

The Sixth Circuit has succintly summarized the rule as follows:

> In that simple single-motive case, proof that the articulated reason was false, and therefore not the true reason for the employment decision, requires entry of judgment for the plaintiff. Aikens, 460 U.S. at 718 (Blackmun, J., concurring)...it is the resulting absence of legitimate explanation for the suspect employment decision that warrants the finding of discrimination.

Sims v. Cleveland, 813 F.2d 790, 793 (6th Cir. 1987).

The Third Circuit relied heavily upon evidence of Defendant's conduct subsequent to Plaintiff's lay off as shedding light on the true motive for selecting the younger employee for retention. Evidence of "post-transaction" facts is admissible to show that a defendant's

contention is not credible and is maintained in bad faith. 31A C.J.S. 444. The hornbook rule is as follows:

> Evidence of the acts or conduct of a person subsequently to the time of a transaction in controversy which are indicative of his state of mind in the doing of an act or which are suggestive of the fact of one's connection with that transaction, and which afford reasonable inferences or throw any light upon the subject matter contested, or upon which any reasonable inference or presumption can be founded as to the truth or falsity of the issue or of a disputed fact, is generally admissible in the trial of a civil action.

29 Am Jur.2d 322.

In view of the conflicting evidence concerning Defendant's motive and the inference of discrimination that the jury may draw where the employer's explanation is not credible, summary judgment was clearly erroneous.

IV. The Third Circuit Decision Follows This Court's Admonition That Summary Judgment Should Be Used Sparingly Where Motive And Intent Are At Issue

The decision below is well-grounded upon the long-standing principle that questions of motive and intent are to be decided by the jury, not by the judge. As stated by this Court:

> Summary Judgment should be used sparingly where motive and intent play leading roles.

Potter v. C.B.S., 368 U.S. 464 (1962); Accord, Sartor v. Arkansas National Gas Corp., 321 U.S. 620 (1943). The trier of fact's "evaluation of credibility [is assisted] by observing demeanor of witnesses while they testify." Alvado v. General Motors Corp., 229 F.2d 408 (2d Cir. 1956). Summary judgment is improper "where motive and intent and subjective feelings and reactions were to be searched." Alabama Great Southern Railway Co. v. L & N Railway Co., 224 F.2d (5th Cir. 1955). As one commentator noted:

> The correct principle is that a court should be cautious in granting a motion for summary judgment where state of mind is involved or where the facts are peculiarly in the knowledge of the moving party.

3 Baron & Holtzoff, Federal Practice and Procedure, 1232.2, p.114 (1951).

Neither Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986), nor Anderson v. Liberty Lobby Inc., 106 S.Ct. 2505 (1968), alters the rule that issues of fact involving intent and motive are jury questions. Whether an employer's action was discriminatory or based upon its "good faith business judgment" is a question of intent and motive. There is no reason to carve out an exception in ADEA cases to the fundamental right to have issues of fact and credibility determined by the jury. There is no reason for employers to be treated more favorably than other litigants.

Defendant would reward the ingenuity of employers who manufacture reasons as a pretext to cover up discrimination. Defendant would

permit such employers to escape a trial even where they have disregarded seniority, ignored a qualified older employee, and manufactured an explanation which was suspect because of post-decision evidence.

This Court should reject the ridiculous contention that juries are not permitted to "second-guess" management decisions. Employer subjective decision making has traditionally been subject to close judicial scrutiny in discrimination cases. Rowe v. General Motors, 457 F.2d 345 (5th Cir. 1980); Misretta v. Sandia Corp., 13 FEP 1690 (D.N.M. 1977) aff'd 639 F.2d 588 (10th Cir. 1980); Carroll v. Sears Roebuck & Co., 708 F.2d 183 (5th Cir. 1983); Harris v. Birmingham Board of Education, 712 F.2d 1377 (11th Cir. 1983); Shlei & Grossman, Employment Discrimination Law, Chapter 6, p.30 (1st Edition, BNA); Stacey, Subjective Criteria In Employment Decisions Under Title VII, 10 Ga. L. Rev. 737 (1976). In this case, the employer had no

seniority system, formal evaluation system, or other objective review prior to selecting the employees to be retained, recalled, or discharged permanently. Here Defendant's defense relied entirely upon the credibility of its supervisory witnesses, Sekeras and Sheatsley. It was they who testified by affidavit and deposition that Faust's alleged diverse skills, rather than his age, was the reason for his retention. (Sekeras affidavit p. JA 15, Sheatsley deposition p. JA 105-06). But, Defendant would deny Plaintiff the opportunity to show that the supervisors were liars who fabricated the "versatility" defense to justify their age-biased decision to retain Faust, age 39, instead of Plaintiff, age 55.

The plain truth is that Plaintiff, age 55, had much more experience as an installation specialist than Faust, age 39. In addition, Faust's non-installation experience was non-technical work as an "office handyman." (Faust deposition 21-22).

But Defendant did not even consider recalling Plaintiff Brieck, age 55, rather than Faust, age 39. (Sheatsley depo. p.38) Finally, Defendant's failure to use the younger Faust for "diverse" duties after his recall is the strongest proof that Defendant's proffered reason for terminating Plaintiff Brieck and retaining Faust was nothing more than a "cover-up" for age discrimination.

Was it a coincidence that Defendant's decision makers selected the youngest of the four installation specialists? Or did they select the alleged versatility criteria in order to produce the desired result, retention of the youngest employee, Faust, age 39? These critical questions cannot be decided without considering the demeanor of the company witnesses and without full cross-examination.

V. National Policy Condemning Discrimination Favors Affirmance of the Third Circuit Decision

Discriminating employers have become more subtle over the years. "Smoking gun" direct evidence of discrimination is increasingly difficult to discover. Management has become sophisticated in its handling of terminations. "Documentation," consultation with counsel, and boiler plate explanations can be used to cover up a forbidden motive. Now, more than ever before, it is necessary to retain the inferences arising from the McDonnell Douglas prima facie case and the "prima facie plus pretext" standards. ADEA plaintiffs should be able to show, by cross examination and evidence of inconsistencies and implausibilities, that seemingly legitimate explanations are in fact a sham and cover up for age discrimination.

Individuals have tremendous obstacles in litigation. The employer controls all the evidence. Non-union employees have scant access to disparate treatment and statistical information. Employer discovery abuse, the high cost of litigation, and court imposed discovery limits often prevent employees from access to the truth.

Discrimination is a blight on the American scene. If Congressional objectives of a bias-free work place are to be achieved, the courts must continue to permit plaintiffs to prevail by the use of indirect and circumstantial evidence of discrimination, as set forth in Burdine.

CONCLUSION

Plaintiff's evidence raising inferences of discrimination and discrediting Defendant's alleged reasons for his dismissal was more than sufficient to create issues of fact entitling him to trial by jury and

precluding summary judgment. Thus, Amicus Curiae respectfully urges this Court to affirm the decision of the Third Circuit and permit the jury to determine the issues concerning the motive and intent of Defendant.

Respectfully submitted,

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No. 87-271

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC.,

Petitioner,

vs.

EUGENE F. BRIECK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a plaintiff in an action brought pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. Sections 621 et seq., may survive an employer's motion for summary judgment by producing evidence that the employer's proferred reasons are unworthy of credence?

PARTIES TO THE PROCEEDING

Petitioner:
Harbison-Walker Refractories, A Division
of Dresser Industries, Inc.

Respondent
Eugene F. Brieck

Amicus Curiae:
American Association of Retired Persons

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No. 87-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC.,

Petitioner,

vs.

EUGENE F. BRIECK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENT

The American Association of Retired Persons ("AARP"), of 1909 K Street, N.W., Washington, D.C. 20049, respectfully submits this brief *amicus curiae* in support of the Respondent. The written consents of all parties have been filed with the Clerk of this Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Association of Retired Persons, "AARP", is a not-for-profit membership corporation of more than 29 million

persons age 50 and older. AARP is the largest organized group of older Americans in the country.[1] Approximately eight million AARP members are employed individuals, most of whom are protected by the Age Discrimination in Employment Act, "ADEA", 29 U.S.C. § 621 *et seq.*

In keeping with its purposes, AARP is working to alleviate age discrimination in employment as well as other aspects of life. AARP has instituted a major campaign to improve the employment opportunities available to older workers. The overall objectives of the AARP "Worker Equity Initiative" are to assess the impact of an aging work force on society; eliminate stereotypes of older workers; assist employers in creating work place opportunities for older workers; and help older persons make informed employment and retirement decisions.

The Worker Equity Initiative seeks to eliminate age discrimination in the work force through legislative, administrative and judicial action, including participation in federal court litigation under the ADEA. Since March 1985, AARP has filed numerous *amicus curiae* briefs in the United States Circuit Courts of Appeal on issues of concern to its working members, and in three instances instituted litigation to protect the rights of its members under the ADEA.[2] AARP also participated as *amicus curiae* in this Court's consideration of two ADEA cases. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985); *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353 (1985).

The issues presented by this appeal directly affect older workers' right to a jury trial of their age discrimination claims. The Third

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[1] In representing the interests of its members, AARP seeks to: (a) enhance the quality of life for older persons, (b) promote independence, dignity and purpose for older persons; (c) lead in determining the role and place of older persons in society; (d) sponsor research on physical, psychological, social, economic and other aspects of aging; and (e) represent the point of view of older persons as members of the work force.

[2] *AARP v. EEOC*, 655 F. Supp. 228 (D.D.C.), *rev'd in part*, 823 F.2d 600 (D.C. Cir. 1987); *AARP v. E.I. DuPont de Nemours & Co*, No. 86-6866 (E.D. Pa. filed Nov. 21, 1986); *AARP v. Farmers Group, Inc.*, No. 86-6203 (C.D. Cal. filed Sept. 23, 1986).

Circuit's decision preserved that right in holding that an ADEA plaintiff can withstand summary judgment by presenting evidence "that the employer's proffered explanation is unworthy of credence" in accordance with the standard enunciated in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983). This standard properly precludes summary judgment against victims of age discrimination even if they have not presented "any evidence that age was a determining factor in the employer's motivation." *Oxman v. WLS-TV*, 846 F.2d 448, 46 Fair Empl. Prac. [BNA] Cas. 1392, 1395 (7th Cir. 1988), quoting *LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409-10 (7th Cir. 1984). It insures that older workers will have their day in court despite the unavailability of direct evidence. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

The standard for summary judgment set forth by the court below also accords victims of age discrimination the same treatment as victims of race or sex discrimination under Title VII of the Civil Rights Act of 1964,[3] as established by *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This Court has recognized the close relationship between Title VII and the ADEA which share the common purpose of eradicating discrimination and contain prohibitions that are *in haec verba*. *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). In this instance, age discrimination plaintiffs should therefore be subject to the same standard of proof as Title VII plaintiffs, who can not only withstand summary judgment but can prevail under *Burdine's* "unworthy of credence" standard.

STATEMENT OF THE CASE

Eugene Brieck (Respondent) joined Harbison-Walker Refractories (Petitioner) in 1965 and worked for seventeen years as a brick installation specialist. J.A. 59. In July 1982, during a reduction-in-force, Brieck was laid off at age 55 along with another installation specialist who was 59 years old. J.A. 33. About one month later, Harbison-Walker laid off another installation specialist, E.G. Malarich, age 59, while retaining a 39 year old installation specialist, Hugh Faust, until November 1982 when he was laid off. J.A. 33.

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[3] 42 U.S.C. § 2000e *et seq.*

The 39 year old Faust was the only installation specialist to be recalled by Harbison-Walker. J.A. 15.

Brieck sued, claiming that Harbison-Walker's decision to terminate him and to recall a younger worker violated the ADEA. Upon Petitioner's motion, the U.S. District Court for the Western District of Pennsylvania granted summary judgment for Harbison-Walker. Although the district court found that Brieck had established a prima facie case of discrimination, P.A. 15a, the district court determined that Harbison-Walker presented a legitimate, nondiscriminatory reason for firing Brieck and retaining Faust. P.A. 16a. The district court reasoned that Brieck was required to present evidence of pretext showing that his age was a determining factor in the lay-off decision. P.A. 17a. Concluding that the evidence presented did not meet this burden, the district court awarded summary judgment to Harbison-Walker.[4]

Reversing the district court, the Third Circuit Court of Appeals held that the district court erred in requiring Brieck to "establish a direct inference that the employer discharged him because of his age." P.A. 2a. Rather, the Third Circuit emphasized that the proper standard permits an ADEA plaintiff to satisfy its burden of opposing summary judgment by introducing evidence that could support an inference of discrimination. *Id.* Specifically, the Third Circuit held that evidence challenging the credibility of the employer's proffered reason was sufficient to raise an inference that the employer did not act for nondiscriminatory reasons. *Id.* Finding such evidence present in this case, the Third Circuit held summary judgment was improper because a genuine issue of material fact existed. P.A. 5a.

SUMMARY OF ARGUMENT

The standard for determining the appropriateness of summary judgment set forth by the Third Circuit adheres to the framework established by this Court for proving employment discrimination.

[4] The district court also rejected Brieck's claims for breach of contract and the tortious infliction of emotional distress which are not in issue here. P.A. 17a – 20a.

See McDonnell Douglas Corp. v. Green, *supra*. In *United States Postal Service Board of Governors v. Aikens*, 460 U.S. at 716, and *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 256, this Court expressly held that a plaintiff may establish discrimination by direct evidence of discriminatory motive *or* by indirect evidence "that the employer's proffered explanation is unworthy of credence." (Emphasis added). Based on this premise, the Third Circuit properly held that an ADEA plaintiff may withstand summary judgment by presenting evidence that reveals inconsistencies and implausibilities in the employer's asserted reason. P.A. 2a. The Court of Appeals rejected the district court's holding that a plaintiff is required to present age-related evidence of discriminatory intent to show that the employer's reasons were pretextual. This analysis is not only consistent with the standard applied under Title VII by this Court,[5] it is supported by the holdings of several other circuit courts in ADEA cases.[6]

The decision below simply applied these well-established principles of proof to the determination of summary judgment, consistent with this Court's recent analysis of Fed. R. Civ. P. 56. *See Anderson v. Liberty Lobby*, 477 U.S. 317, 106 S. Ct. 2505 (1986). The Court of Appeals held that evidence challenging the credibility of the employer's proffered explanation could reasonably support an inference that the employer did not act for nondiscriminatory reasons. P.A. 2a. Because a jury could draw the inference that the employer's reasons were pretextual, the Third Circuit correctly held that summary judgment was inappropriate. *See Perez v. Curcio*, 841 F.2d at 258. Since the Third Circuit properly applied the principles governing summary judgment as well as the substantive law, this Court should affirm the decision below.

[5] *See Aikens*, 460 U.S. at 716, 718; *Burdine*, 450 U.S. at 256.

[6] *See Sorba v. Pennsylvania Drilling Co.*, 821 F.2d 200 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 730 (1988); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987), *cert. dismissed by stipulation*, 108 S. Ct. 26 (1987); *Oxman v. WLS-TV*, *supra*; *Ayala v. Mayfair Molded Products Corp.*, 831 F.2d 1314 (7th Cir. 1987); *Perez v. Curcio*, 841 F.2d 255 (9th Cir. 1988); *Castle v. Sangamo Weston., Inc.*, 837 F.2d 1550 (11th Cir. 1988); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525 (11th Cir. 1987).

ARGUMENT

I. THE COURT BELOW CORRECTLY HELD THAT SUMMARY JUDGMENT WAS IMPROPER WHERE A GENUINE ISSUE EXISTED CONCERNING THE EMPLOYER'S PROFFERED EXPLANATION.

The issue before this Court is the proper standard to be applied in determining a plaintiff's burden in meeting a summary judgment challenge in an ADEA case.[7] As this Court held in *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. at 2510, the substantive law determines which facts are material. To determine whether the Respondent's evidence was material and sufficient to withstand summary judgment, the Third Circuit applied the framework of *United States Postal Service Board of Governors v. Aikens*, 400 U.S. at 716, and *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 256, which established that a plaintiff can prevail on his discrimination claim by presenting "indirect evidence that the employer's proffered reason is unworthy of credence." Reasoning that a plaintiff could prevail by such proof, the Court of Appeals held that summary judgment was improper where an ADEA plaintiff presented evidence discrediting the employer's proffered business explanation. Finding that the plaintiff's evidence sufficiently attacked the credibility of the employer's reason, the court concluded that plaintiff raised a genuine issue of material fact regarding the employer's intent which precluded summary judgment. P.A. 2a.[8]

The Third Circuit's standard for determining whether summary judgment was proper is consistent with the standards recognized by this Court. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2551 (1986); *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. at 2505. Rule 56 of the Federal Rules of Civil Procedure requires the moving party to show his entitlement to judgment as a matter of law and demonstrate that no genuine issue of material fact exists.

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[7] AARP, as *amicus curiae*, limits its discussion to the legal principles at issue.

[8] The Third Circuit's decision below relies heavily on one of its earlier decisions which contains a more extensive analysis of the appropriate standards and types of proof. *See Chipollini, supra.*

Fed. R. Civ. P. 56(C). The nonmoving party who bears the burden of proof at trial is not required to establish at the summary judgment stage that he will ultimately prevail on his claim. *See First National Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 289 (1968). Rather, the record must contain evidence sufficient to establish only the existence of a triable issue. The nonmovant's evidence need not establish the ultimate issue. Conversely, the party seeking summary judgment must demonstrate the absence of evidence from which a trier of fact could find for the party opposing summary judgment on the merits. *Anderson*, 106 S. Ct. at 2510.

Inferences play a significant role at the summary judgment stage, particularly in discrimination cases. Where conflicting inferences arise from the evidence presented, the nonmoving party must receive the benefit of those inferences as the court is obliged to construe the facts in the light most favorable to the party opposing summary judgment. *Anderson*, 106 S. Ct. at 2513. The court may not weigh the evidence or pass judgment on the credibility of witnesses, *id.*, since that is the role for the trier of fact. *See Rosenfield v. Wellington Leisure Products, Inc.*, 827 F.2d 1493, 1497 (11th Cir. 1987).[9]

As this Court has observed, employment discrimination cases raise difficult issues involving inferences of intent and motive that are critical to the ultimate issue in the case. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. at 716. The employer's intent at the time of an employee's termination is an essential factual question, *see Chipollini*, 814 F.2d at 900. This cautions against the increasing use of summary judgment in employment discrimination cases. *Hillebrand v. M-Tron Industries, Inc.*, 827 F.2d 363, 364 (8th Cir. 1988), *petition for cert. filed*, (Feb. 16, 1988); *Perez v. Curcio, supra*. When a plaintiff presents evidence discrediting an employer's stated reason, which is the manifestation of the employer's intent, the plaintiff raises an issue of material

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[9] Although *Rosenfield* involved review of the standard applicable to judgment notwithstanding the verdict, the standard is similar to that for review of summary judgment or a directed verdict. *Anderson*, 106 S. Ct. at 2512. *See Reynolds v. CLP Corp.*, 812 F.2d 671, 674 (11th Cir. 1987); 9 J. Wigmore on Evidence § 2495 at 391.

fact which must preclude summary judgment. *Chipollini*, 814 F.2d at 899.

In this case, the Petitioner's proffered reason for recalling and retaining a younger worker rather than Respondent was the alleged need for diverse skills. Respondent's evidence that the younger worker who was retained did not use or need diverse skills after the reduction-in-force suggested that the reason articulated by Petitioner was not credible. In a reduction-in-force or layoff situation, this type of evidence is critical in determining whether the employer's reason for retaining the younger worker and terminating the older worker is truly nondiscriminatory.

The Third Circuit properly applied the substantive law in determining that summary judgment was inappropriate given the evidence below. Essential to the Court of Appeals' holding was its finding that the lower court disregarded the type and import of Respondent's evidence in challenging the credibility of Petitioner's proffered reason for the employment decisions in issue. The effect of such evidence is to support an inference that the company acted for a reason — more than likely an impermissible one — other than it proffered. *See Chipollini*, 814 F.2d at 899. Thus, the Third Court properly held that the district court erred in determining whether the employer's reason was plausible. Rather, at the summary judgment stage, the court's inquiry must be limited to "whether there is also evidence of record which, if credited, could render the reason implausible." P.A. 5a-6a. Testing the credibility of the proffered reason must necessarily be left to the jury. *Rosenfield*, 827 F.2d at 1497.

The standard applied by the Third Circuit for reviewing summary judgment in age discrimination cases strikes an appropriate balance between this Court's holdings on summary judgment and proving discrimination. If evidence that the employer's explanation is unworthy of credence may establish the ultimate issue of discrimination, evidence which questions the credibility of the employer's reason should suffice to raise an inference of discrimination. In other words, since such proof entitles the victim of discrimination to prevail, it must similarly permit him to withstand summary judgment.

Petitioner's protestations that the lower court's standard eliminates summary judgment for employers are unfounded. Despite the application of that standard by several circuits, employers continue to overwhelmingly prevail on summary judgment in ADEA cases.[10] While the summary judgment mechanism serves to eliminate cases where there is no genuine issue for trial, summary judgment should not be used as a tool to unfairly deny plaintiffs their day in court. *See Anderson*, 106 S. Ct. at 2514; *Hillebrand v. M-Tron Industries, Inc.*, 827 F.2d at 364. The reasoning and holding of the Third Circuit insures the right of ADEA plaintiffs to the jury determination which Congress granted to them.

II. THE COURT BELOW APPLIED THE PROPER STANDARD FOR PROVING AGE DISCRIMINATION.

Under the standards set forth by this Court in *Aikens*, 460 U.S. 711, *Burdine*, 450 U.S. 248, a victim of discrimination may prevail by "indirect evidence that the employer's proffered explanation is unworthy of credence." Relying on this principle, the court below held that evidence attacking the truth or credibility of the employer's reason is clearly material and sufficient to raise a genuine issue precluding summary judgment. P.A. 2a.

The decision below should be affirmed because it properly applied the substantive law principles set forth by this Court to the determination of summary judgment. Moreover, the Third Circuit's application of *Burdine's* standard to ADEA cases is consistent with this Court's recognition of the parallel provisions and goals of Title VII and the ADEA. *See Lorillard v. Pons*, 434 U.S. at 584.

A. In Title VII Cases, This Court Has Repeatedly Confirmed That Pretext May Be Established Solely By Showing that the Employer's Reasons Are Unworthy of Credence.

Given the absence of "smoking gun" evidence in discrimination cases, this Court developed a framework for cases under Title VII

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[10] In survey of reported ADEA cases from 1978 to June 1986, employers prevailed in 142 of 153 summary judgment cases. *See Working Americans: Equality at Any Age, Hearing Before the Senate Special Committee on Aging*, S. Hrg. No. 826, 99th Cong., 2d Sess. 90 (June 19, 1986). In contrast, where ADEA claims went to trial, employers had only a slight edge in prevailing (93 cases) over plaintiffs (90 cases). *Id.* at 91.

whereby plaintiffs could prove discrimination without presenting specific evidence of discriminatory intent. *See McDonnell Douglas Corporation v. Green*, *supra*. The *McDonnell Douglas* framework allows a plaintiff to establish a prima facie case of discriminatory termination by showing that (1) he is in the protected class; (2) he was qualified for the position; (3) he was terminated despite his qualifications; and (4) a younger worker replaced him or was retained.[11] *Burdine*, 450 U.S. at 253. The prima facie case creates a rebuttable presumption that the employer's act was motivated by an impermissible factor. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

The effect of the rebuttable presumption on the employer's burden was clarified by the Court in *Burdine*. Once a plaintiff establishes a prima facie case, the employer may rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory reason for the employment decision. *Burdine*, 450 U.S. at 254. If the employer succeeds in its burden of production, the plaintiff must prove that the proffered reason is merely a pretext for discrimination. *Id.* at 256.

Questions regarding the employer's intent fall under the determination of pretext. *Chipollini*, 814 F.2d at 898. In *Burdine*, the Court expressly held that a plaintiff can establish pretext in one of two ways. 450 U.S. at 256. A plaintiff may establish pretext "directly by persuading the court that a discriminatory reason more likely motivated the employer." *Id. Accord Aikens*, 460 U.S. at 717-718 (Blackmun, J. concurring). In the alternative, a plaintiff may prove pretext "*indirectly by showing that the employer's proffered explanation is unworthy of credence.*" *Burdine*, 450 U.S. at 256 (emphasis added).

The court below scrupulously followed the standards set forth in *McDonnell Douglas*, *Burdine*, and *Aikens* in holding that evidence challenging the credibility of the employer's reason to show

[11] The fourth element of the *McDonnel Douglas* test has been modified for reduction-in-force cases in which the plaintiff is generally not replaced by a younger worker. *Oxman v. WLS-TV*, *supra*.

that it was false constitutes proof of pretext. Yet Petitioner urges the Court to retreat from this settled method of proving employment discrimination. Petitioner would limit proof of pretext to age-related evidence and would require victims of discrimination to produce *additional* evidence at the pretext stage. Petitioner's suggestions are contrary to the purposes of the *McDonnell Douglas* framework and have already been rejected by this Court in *Aikens*.

The *McDonnell Douglas* framework serves important purposes in proving employment discrimination. First, it allows plaintiffs to prevail without direct evidence which is generally unavailable in discrimination cases. *See Teamsters v. United States*, 431 U.S. 324, 358, n. 44 (1977). The prima facie case raises a presumption of discrimination because it eliminates the most common legitimate reasons for the employment action. *Furnco Construction Corp. v. Waters*, 438 U.S. at 577. If a plaintiff establishes a prima facie case which the employer fails to rebut, the plaintiff is entitled to prevail. *Burdine*, 450 U.S. at 245. The reason the plaintiff prevails at the point is because the *McDonnell Douglas/Burdine* framework allows the trier of fact to infer that the employment decision was based on discriminatory reasons.

Where the employer produces a legitimate, nondiscriminatory reason for its decision, the mandatory presumption created by the *McDonnell Douglas/Burdine* test drops from the case. *Aikens*, 460 U.S. at 715. However, a plaintiff need not present additional evidence or direct evidence of discriminatory intent to prove pretext as Petitioner argues, *Aikens*, 460 U.S. at 715, 717, because the prima facie case already tied the evidence and inferences to age-based animus.

The *McDonnell Douglas* framework was not designed to have courts ignore the evidence and inferences raised by the plaintiff's prima facie case once the employer articulates a legitimate business reason. *Burdine*, 450 U.S. at 255, n. 10. While the presumption may be dispelled, the evidence and inferences from the plaintiff's initial showing remain and may be considered with all of the evidence as the court decides the ultimate factual issue. *Aikens*, 460 U.S. at 715. As this Court recognized in *Burdine*, "there may be some cases where the plaintiff's initial evidence, combined with

effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." *Burdine*, 450 U.S. at 255, n. 10.

Indeed, if a plaintiff presents evidence discrediting the employer's proffered explanation, the inference of discrimination should be stronger than if the employer had produced no explanation since the plaintiff has gone beyond his prima facie showing. Such evidence suggests that the employer has something to hide. The "unworthy of credence" standard established by this Court means that neither direct evidence nor indirect evidence specifically limited to age-based animus is required to show pretext. Rather, the trier of fact may resolve the ultimate issue by "decid[ing] which party's explanation of the employer's motivation it believes." *Aikens*, 460 U.S. at 716.

Aikens and *Burdine* clearly reject Petitioner's contention that a plaintiff must do more than present evidence that the employer's proffered reason is unworthy of credence. In arguing that ADEA plaintiffs must present age-related evidence of pretext to withstand summary judgment, Petitioner essentially asks the Court to retreat from the accepted meaning of *Burdine*. The Court should decline that invitation and instead reaffirm the balanced and practical approach set forth in *Burdine* and *Aikens*.

B. Age Discrimination Claims are Subject to the Same Principles and Method of Proof as Claims Under Title VII.

Finding age discrimination in our society to be pervasive, Congress enacted the ADEA in 1967 to prohibit arbitrary discrimination based on age in employment. *See* 29 U.S.C. § 621(a). While the problem may be pervasive, the courts have repeatedly recognized that age discrimination may be subtle. *Castle v. Sangamo Weston, Inc.*, 837 F.2d at 1559; *LaMontagne*, 750 F.2d at 1410. Direct evidence of discrimination is generally unavailable to the ADEA plaintiff or is difficult to find. *Id. See Chipollini*, 814 F.2d at 899; *Dillon v. Coles*, 746 F.2d 998, 1003 (3d Cir. 1984). As a result, many victims of age discrimination are unable to produce direct or circumstantial evidence that age was a determining factor in the employment decision. *Oxman v. WLS-TV*, 46 Fair Empl. Prac. at 1395.

A majority of the circuit courts have applied the Title VII framework of proof to ADEA cases recognizing that the method of proof serves similar purposes under both statutes.[12] To otherwise require direct evidence of age discrimination in the employment decision would make it virtually impossible to prove an ADEA claim. "Employers are rarely so cooperative as to include a notation in the personnel file, 'fired due to age'; or to inform a dismissed employee candidly that he is too old for the job." *Thornbrough*, 760 F.2d at 638. The *McDonnell Douglas/Burdine* standard serves to create the inference that age was a determining factor in the employer's decision. *Oxman v. WLS-TC*, 46 Fair Empl. Prac. at 1397. Thus, the indirect method of proof allows victims of discrimination to prevail without presenting *any* age-related evidence independent of the requirements of the prima facie case. *LaMontagne*, 750 F.2d at 1409-10 (emphasis in original).

The standard for summary judgment in an ADEA case articulated by the Third Circuit requires no more or no less than the same standards under which victims of discrimination based on race or sex may prevail on their claims. *See Aikens*, 460 U.S. 711; *Burdine*, 450 U.S. 248; *McDonnell Douglas*, 411 U.S. 792. Petitioner's arguments would impose a greater standard of proof on the victim of age discrimination opposing summary judgment than is required of the race discrimination victim to prevail overall. A requirement that an ADEA plaintiff's claim would fail without direct evidence, or indirect evidence specifically related to age as Petitioner argues, would overturn settled civil rights law and would undermine the purposes of the ADEA. In light of the common objectives of the ADEA and Title VII[13] and the importance of the

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[12] *See Castle v. Sangamo Weston, Inc.*, 837 F.2d at 1559 (11th Cir.); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 n.1 (10th Cir. 1988); *Russo v. Trifari, Kaussman & Fishel, Inc.*, 837 F.2d 40, 43 (2d Cir. 1988); *Ayala v. Mayfair Molded Products Corp.*, 831 F.2d 1314, 1318 (7th Cir. 1988); *Perez v. Curcio*, 841 F.2d at 257 (9th Cir.); *Chipollini* 814 F.2d at 896-98 (3d Cir.); *Sims v. Cleland*, 813 F.2d 790, 792 (6th Cir. 1987); *Thornbrough v. Columbus & Greenville Railroad Co.*, 760 F.2d 633, 639 (5th Cir. 1985).

[13] *See Lorillard v. Pons*, 434 U.S. at 584.

McDonnell Douglas framework to proving violations of either statute, this Court should confirm the application of the indirect method of proof to ADEA cases.

The standard applied by the Third Circuit is not only in accordance with this Court's holdings under Title VII, it is consistent with the decisions of several other circuit courts contrary to Petitioner's suggestion of a conflict in the circuits[14] or that the decision below radically departs from established precedent. In addition to the Third Circuit,[15] the Seventh,[16] Ninth[17] and Eleventh[18] Circuits have explicitly held that an ADEA plaintiff may withstand summary judgment by presenting evidence that the employer's proffered explanation is "unworthy of credence". Following this Court's analysis under *Burdine*, these circuits recognize that the indirect method of proof permits a plaintiff to prevail by producing evidence challenging the truth of the employer's reason.[19] Moreover, these cases support the holding that a plaintiff need not produce age-related evidence of pretext to withstand summary judgment. *See also Rosenfield*, 827 F.2d at 1496. (Evidence discrediting the employer's proffered explanation established pretext). As the Ninth Circuit recently observed.

> As long as [Plaintiff] introduced some evidence from which a jury could believe [Plaintiff's] explanation rather than the [employer's] explanation and material questions of fact exist, the case must go to a jury.

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[14] The only decision that is arguably in direct conflict with the decision below is *White v. Vathally*, 732 F.2d 1037 (1st Cir. 1984), *cert. denied*, 469 U.S. 933 (1984). *White* is inapposite to the meaning and application of *Aikens* and *Burdine* and should be rejected by this Court.

[15] *Sorba v. Pennsylvania Drilling Co., supra.; Chipollini, supra.*

[16] *Oxman v. WLS-TC, supra; Ayala v. Mayfair Molded Products Corp., supra.*

[17] *Perez v. Curcio, supra.*

[18] *Castle v. Sangamo Weston, Inc., supra; Rollins v. TechSouth, Inc., supra.*

[19] Other courts have also applied the *Burdine* "unworthy of credence" standard without extensive comment. *See Sims v. Cleland*, 813 F.2d at 792.

Perez v. Curcio, 841 F.2d at 258.

The question here is not whether Respondent proved pretext, but rather whether the plaintiff raised a genuine issue of material fact regarding pretext. *See Thornbrough*, 760 F.2d at 646. The Third Circuit simply articulated in a clear and straightforward manner the substantive law on the question of pretext which the courts have been applying to Title VII and ADEA cases since *Burdine*. No reason suggests the need to diverge from that course.

CONCLUSION

For the foregoing reasons, the American Association of Retired Persons respectfully urges the Court to affirm the decision of the Third Circuit below.

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